



A ROADMAP FOR MAKING NATIVE AMERICA SAFER

Report to the President &
Congress of the United States



Indian Law & Order Commission
November 2013



Indian Law & Order COMMISSION

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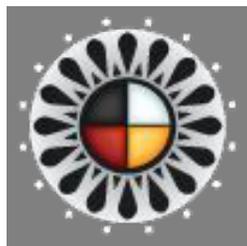
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PREFACE

The Indian Law and Order Commission is pleased to transmit its final report and recommendations—A ROADMAP FOR MAKING NATIVE AMERICA SAFER—as required by the Tribal Law and Order Act of 2010, Public Law 111-211 (TLOA). These recommendations are intended to make Native American and Alaska Native nations safer and more just for all U.S. citizens and to reduce the unacceptably high rates of violent crime that have plagued Indian country for decades. This report reflects one of the most comprehensive assessments ever undertaken of criminal justice systems servicing Native American and Alaska Native communities.

The Indian Law and Order Commission is an independent national advisory commission created in July 2010 when the Tribal Law and Order Act was passed and extended earlier in 2013 by the Violence Against Women Act Reauthorization (VAWA Amendments). The President and the majority and minority leadership of the Congress appointed the nine Commissioners, all of whom have served as volunteers. Importantly, the findings and recommendations contained in this Roadmap represent the unanimous conclusions of all nine Commissioners—Democratic and Republican appointees alike—of what needs to be done now to make Native America safer.¹

As provided by TLOA, the Commission received limited funding from the U.S. Departments of Justice and the Interior to carry out its statutory responsibilities. To save taxpayers' money, the Commission has operated entirely in the field—often on the road in federally recognized Indian country—and conducted its business primarily by phone and Internet email. The Commission had no offices. Its superb professional staff consists entirely of career Federal public officials who have been loaned to the Commission as provided by TLOA, and we are grateful to them and the Departments of Justice and the Interior.

TLOA has three basic purposes. First, the Act was intended to make Federal departments and agencies more accountable for serving Native people and lands. Second, TLOA was designed to provide greater freedom for Indian Tribes and nations to design and run their own justice systems. This includes Tribal court systems generally, along with those communities that are subject to full or partial State criminal jurisdiction under P.L. 83-280. Third, the Act sought to enhance cooperation among Tribal, Federal, and State officials in key areas such as law enforcement training, interoperability, and access to criminal justice information.

In addition to assessing the Act's effectiveness, this Roadmap recommends long-term improvements to the structure of the justice system in Indian country. This includes changes to the basic division of responsibility among Federal, Tribal, and State officials and institutions. The theme here is to provide for greater local control and accountability while respecting the Federal constitutional rights of all U.S. citizens.

Tribal governments, like all governments, have a moral duty to their citizens and guests to ensure the public's safety. They are also the most appropriate and capable government to ensure such safety—they employ the local police, they are the first responders, and understand the needs of their community better than all others. Unfortunately, the American legal system—through legislation and case law—has significantly hamstrung their ability to ensure safety in Indian country.

*Brent Leonhard, Interim Lead Attorney, Confederated Tribes of the Umatilla Indian Reservation
Written testimony for the Indian Law and Order Commission, Hearing on the Tulalip Reservation, WA
September 7, 2011*

Some of the Commission's recommendations require Federal legislative action. Others are matters of internal executive branch policy and practice. Still others must be addressed by the Federal judiciary. Finally, much of what the Commission has proposed will require enlightened and energetic leadership from the State governments and, ultimately, Native Americans and Alaska Native citizens and their elected leaders.

The Commission finds that the public safety crisis in Native America is emphatically not an intractable problem. More lives and property can and will be saved once Tribes have greater freedom to build and maintain their own criminal justice systems. The Commission sees breathtaking possibilities for safer, strong Native communities achieved through home-grown, tribally based systems that respect the civil rights of all U.S. citizens, and reject outmoded Federal command-and-control policies in favor of increased local control, accountability, and transparency.

With this Roadmap, the Commission completes its official work as provided by TLOA and the VAWA Amendments and extends its best wishes to everyone who helped with this journey. Thank you for the privilege of serving.

Respectfully,

A handwritten signature in black ink that reads "Troy A. Eid". The signature is fluid and cursive, with a large initial "T" and a decorative flourish at the end.

Troy A. Eid
Chairman
Indian Law and Order Commission

¹Due to federal budget limitations, the Commission could not begin its work until the late summer 2011, so its one-year extension by the VAWA Reauthorization was a great asset in finishing our report on time and under budget.

A ROADMAP FOR MAKING NATIVE AMERICA SAFER

EXECUTIVE SUMMARY

American Indian and Alaska Native communities and lands are frequently less safe—and sometimes dramatically more dangerous—than most other places in our country. Ironically, the U.S. government, which has a trust responsibility for Indian Tribes, is fundamentally at fault for this public safety gap. Federal government policies have displaced and diminished the very institutions that are best positioned to provide trusted, accountable, accessible, and cost-effective justice in Tribal communities.

In most U.S. communities, the Federal government plays an important but limited role in criminal justice through the enforcement of laws of general application—that is, those laws that apply to all U.S. citizens—creating drug-control task forces, anti-terrorism and homeland security partnerships, and so forth. Under this system of federalism, State and local leaders have the authority and responsibility to address virtually all other public safety concerns.

Precisely the opposite is true in much of Indian country. The Federal government exercises substantial criminal jurisdiction on reservations. As a result, Native people—including juveniles—frequently are caught up in a wholly nonlocal justice system. This system was imposed on Indian nations without their consent in the late 19th century and is remarkably unchanged since that time. The system is complex, expensive, and simply cannot provide the criminal justice services that Native communities expect and deserve.

It is time for change.

Now is the time to eliminate the public safety gap that threatens so much of Native America. The United States should set a goal of closing the gap within the next decade. By 2024, coinciding with the centennial of the Indian Citizenship Act of 1924,¹ Native Americans and Alaska Natives should no longer be treated as second-class citizens when it comes to protecting their lives, liberty, and pursuit of happiness.

“A Roadmap for Making Native America Safer” (Roadmap) provides a path to make Native American and Alaska Native communities safer and more just for all U.S. citizens and to reduce unacceptably high rates of violent crime rates in Indian country.

The Roadmap is the culmination of hearings, meetings, and conversations between the Indian Law and Order Commission (Commission) and numerous Tribal, State, and Federal leaders, non-profit organization representatives, and other key stakeholders across our country.

ABOUT THE COMMISSION

In 2010, Congress passed, and the President signed, the Tribal Law and Order Act, P.L. 111-211 (TLOA), which created the Indian Law and Order Commission. The Commission is an independent national advisory commission comprised of nine members who have all served as volunteers in unanimously developing the Roadmap. The President and the majority and minority leadership of Congress appointed these commissioners.

TLOA directed the Commission to develop a comprehensive study of the criminal justice system relating to Indian country, including:

1. jurisdiction over crimes committed in Indian country and the impact of that jurisdiction on the investigation and prosecution of Indian crimes and residents of Indian land;
2. the Tribal jail and Federal prison systems with respect to reducing Indian country crime and the rehabilitation of offenders;
3. Tribal juvenile justice systems and the Federal juvenile justice system as it relates to Indian country and the effect of those systems and related programs in preventing juvenile crime, rehabilitating Indian youth in custody, and reducing recidivism among Indian youth;
4. the impact of the Indian Civil Rights Act of 1968 on the authority of Indian Tribes, the rights of defendants subject to Tribal government authority, and the fairness and effectiveness of Tribal criminal justice systems; and
5. studies of such other subjects as the Commission determines relevant to achieve the purpose of the Tribal Law and Order Act.

TLOA directed the Commission to develop recommendations on necessary modifications and improvements to the justice systems at the Tribal, State, and Federal levels. TLOA prescribed consideration of:

1. simplifying jurisdiction in Indian country;
2. improving services and programs to prevent juvenile crime on Indian land, to rehabilitate Indian youth in custody, and to reduce recidivism among Indian youth;
3. adjusting the penal authority of Tribal courts and exploring the alternatives to incarceration;
4. enhancing use of the Federal Magistrates Act in Indian country;
5. identifying effective means of protecting the rights of victims and defendants in Tribal criminal justice systems;
6. recommending changes to the Tribal jails and Federal prison systems; and
7. examining other issues that the Commission determines would reduce violent crime in Indian country.

TLOA provided the Commission with 2 years in which to complete this task, making the report due in 2012. However, due to Federal budget

limitations, the Commission could not begin its work until late summer 2011. Congress provided the Commission a 1-year statutory extension when it passed the Violence Against Women Reauthorization Act of 2013, P.L. 113-4.

As provided by TLOA, the Commission received limited funding from the U.S. Departments of Justice and the Interior to carry out its statutory responsibilities. To save taxpayers' money, the Commission operated entirely in the field—often in federally recognized Indian country—and completed its business primarily by phone and email. The Commission had no offices. Its professional staff consists entirely of career Federal public officials who have been loaned to the Commission as provided by TLOA. The Commission recruited each of its three staff members; when asked to serve, all three graciously did so.

Upon completing these field hearings and meetings, the Commission developed this report. The report is called a “Roadmap” because the Commission has a particular destination in mind—to eliminate the public safety gap that threatens so much of Native America.

ABOUT THE ROADMAP

TLOA has three basic purposes. First, it was intended to make Federal departments and agencies more accountable for serving Tribal lands. Second, the Act was designed to provide greater freedom for Indian Tribes and nations to design and run their own justice systems. This includes Tribal court systems generally, along with those communities that are subject to full or partial State criminal jurisdiction under P.L. 83-280. Third, the Act sought to enhance cooperation among Tribal, Federal, and State officials in key areas such as law enforcement training, interoperability, and access to criminal justice information. This Roadmap assesses the effectiveness of these provisions.

Additionally, the Roadmap recommends long-term improvements to the structure of the justice system in Indian country. This includes the basic division of responsibility among Federal, State, and Tribal officials and institutions. Some of these recommendations require legislative action. Others are matters of executive branch policy. Still others will require action by the Federal judiciary. Finally, much of what the Commission has proposed will require enlightened and energetic leadership from the governments of the several States and, ultimately, Indian Tribes and nations themselves.

A major theme of this Roadmap is that public safety in Indian country can improve dramatically once Native nations and Tribes have greater freedom to build and maintain their own criminal justice systems. The Commission sees breathtaking possibilities for safer, strong Native communities achieved through homegrown, tribally based systems that respect the civil rights of all U.S. citizens. The Commission rejects

outmoded command-and-control policies, favoring increased local control, accountability, and transparency.

The Roadmap contains six chapters, addressing: (1) Jurisdiction; (2) Reforming Justice for Alaska Natives; (3) Strengthening Tribal Justice; (4) Intergovernmental Cooperation; (5) Detention and Alternatives; and (6) Juvenile Justice.

Each chapter contains a full discussion of the aforementioned topics, providing background information, data, and on-the-ground examples about the current challenges facing Indian country. Below is a summary of each chapter. **All recommendations in this Roadmap represent the unanimous views of all nine members of the Commission, Republicans and Democrats alike.**

CHAPTER 1 - JURISDICTION: BRINGING CLARITY OUT OF CHAOS

Under the United States' Federal system, States and localities have primary responsibility for criminal justice. They define crimes, conduct law enforcement activity, and impose sanctions on wrongdoers. Police officers, criminal investigators, prosecutors, public defenders and criminal defense counsel, juries, and magistrates and judges are accountable to the communities from which victims and defendants hail. Jails and detention centers are often located within those same communities.

This framework contrasts with Indian country, where U.S. law requires Federal or State governments' control of the vast majority of criminal justice services and programs over those of local Tribal governments. Federal courts, jails, and detention centers are often located far from Tribal communities.

Disproportionately high rates of crime have called into question the effectiveness of current Federal and State predominance in criminal justice jurisdiction in Indian country. Because the systems that dispense justice in their communities originate in Federal and State law, rather than in Native nation choice and consent, Tribal citizens tend to view them as illegitimate: they do not align with Tribal citizens' perceptions of the appropriate way to organize and exercise coercive authority.

The current framework is institutionally complex. Deciding which jurisdiction delivers criminal justice to Indian country depends on a variety of factors, including but not limited to: where the crime was committed, whether or not the perpetrator is an Indian or non-Indian, whether or not the victim is Indian or non-Indian, and the type of crime committed.

The extraordinary waste of governmental resources resulting from the so-called Indian country "jurisdictional maze" can be shocking, as is the cost in human lives.

While problems associated with institutional illegitimacy and jurisdictional complexities occur across the board in Indian country, the Commission found them to be especially prevalent among Tribes subject to P.L. 85-280 or similar types of State jurisdiction. Distrust between Tribal communities and criminal justice authorities leads to communication failures, conflict, and diminished respect.

Many Tribal governments have been active in seeking ways to make do with the current jurisdictional structure. However, working around the current jurisdictional maze will continue to deliver suboptimal justice because of holes in the patchwork system and these “work-arounds” still do not provide Tribal governments with full authority over all crime and all persons on their lands.

The Commission has concluded that criminal jurisdiction in Indian country is an indefensible morass of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions and without the consent of Tribal nations.

Ultimately, the imposition of non-Indian criminal justice institution in Indian country extracts a terrible price: limited law enforcement; delayed prosecutions, too few prosecutions, and other prosecution inefficiencies; trials in distant courthouses; justice system and players unfamiliar with or hostile to Indians and Tribes; and the exploitation of system failures by criminals, more criminal activity, and further endangerment of everyone living in and near Tribal communities. When Congress and the Administration ask why the crime rate is so high in Indian country, they need look no further than the archaic system in place, in which Federal and State authority displaces Tribal authority and often makes Tribal law enforcement meaningless.

The Commission strongly believes, as the result of listening to Tribal communities, that for public safety to be achieved effectively in Indian country, Tribal justice systems must be allowed to flourish, Tribal authority should be restored to Tribal governments when they request it, and the Federal government, in particular, needs to take a back seat in Indian country, enforcing only those crimes that it would otherwise enforce on or off reservation.

Accordingly, the Commission recommends:

1.1: Congress should clarify that any Tribe that so chooses can opt out immediately, fully or partially, of Federal Indian country criminal jurisdiction and/or congressionally authorized State jurisdiction, except for Federal laws of general application. Upon a Tribe’s exercise of opting out, Congress would immediately recognize the Tribe’s inherent criminal jurisdiction over all persons within the exterior boundaries of the Tribe’s lands as defined in the Federal Indian Country Act.² This recognition, however, would be based on the

“When Congress and the Administration ask why the crime rate is so high in Indian country, they need look no further than the archaic system in place, in which Federal and State authority displaces Tribal authority and often makes Tribal law enforcement meaningless.”

understanding that the Tribal government must also immediately afford all individuals charged with a crime with civil rights protections equivalent to those guaranteed by the U.S. Constitution, subject to full Federal judicial appellate review as described below, following exhaustion of Tribal remedies, in addition to the continued availability of Federal habeas corpus remedies.

1.2: *To implement Tribes' opt-out authority, Congress should establish a new Federal circuit court, the United States Court of Indian Appeals. This would be a full Federal appellate court as authorized by Article III of the U.S. Constitution, on par with any of the existing circuits, to hear all appeals relating to alleged violations of the 4th, 5th, 6th, and 8th Amendments of the U.S. Constitution by Tribal courts; to interpret Federal law related to criminal cases arising in Indian country throughout the United States; to hear and resolve Federal questions involving the jurisdiction of Tribal courts; and to address Federal habeas corpus petitions. Specialized circuit courts, such as the U.S. Court of Appeals for the Federal Circuit, which hears matters involving intellectual property rights protection, have proven to be cost effective and provide a successful precedent for the approach that the Commission recommends. A U.S. Court of Indian Appeals is needed because it would establish a more consistent, uniform, and predictable body of case law dealing with civil rights issues and matters of Federal law interpretation arising in Indian country. Before appealing to this new circuit court, all defendants would first be required to exhaust remedies in Tribal courts pursuant to the current Federal Speedy Trial Act, 18 U.S.C. § 3161, which would be amended to apply to Tribal court proceedings so as to ensure that defendants' Federal constitutional rights are fully protected. Appeals from the U.S. Court of Indian Appeals would lie with the United States Supreme Court according to the current discretionary review process.*

1.3: *The Commission stresses that an Indian nation's sovereign choice to opt out of current jurisdictional arrangements should and must not preclude a later choice to return to partial or full Federal or State criminal jurisdiction. The legislation implementing the opt-out provisions must, therefore, contain a reciprocal right to opt back in if a Tribe so chooses.*

1.4: *Finally, as an element of Federal Indian country jurisdiction, the opt-out would necessarily include opting out from the sentencing restrictions of the Indian Civil Rights Act (IRCA). Critically, the rights protections in the recommendation more appropriately circumscribe Tribal sentencing authority. Like Federal and State governments do, Tribal governments can devise sentences appropriate to the crimes they define. In this process of Tribal code development, Tribes may find guidance in the well-developed sentencing schemes at the State and Federal levels.*

CHAPTER 2—REFORMING JUSTICE FOR ALASKA NATIVES: THE TIME IS NOW

Congress exempted Alaska from legislation aimed at reducing crime in Indian country, such as the Tribal Law and Order Act of 2010 and the Violence Against Women Act 2013 reauthorization (VAWA Amendments). Yet, the problems in Alaska are so severe and the number of Alaska Native communities affected so large, that continuing to exempt the State from national policy change is wrong. It sets Alaska apart from the progress that has become possible in the rest of Indian country. The public safety issues in Alaska—and the law and policy at the root of those problems—beg to be addressed. These are no longer just Alaska’s issues; they are national issues.

The strongly centralized law enforcement and justice systems of the State of Alaska are of critical concern. Devolving authority to Alaska Native communities is essential for addressing local crime. Their governments are best positioned to effectively arrest, prosecute, and punish, and they should have the authority to do so—or to work out voluntary agreements with the State and local governments on mutually beneficial terms.

Forty percent of the federally recognized tribes in the United States are in Alaska, and Alaska Natives represent one-fifth of the total State population. Yet these simple statements cannot capture the vastness or the Nativeness of Alaska. The State covers 586,412 square miles, an area greater than Texas, California, and Montana combined. Many of the 229 recognized tribes in Alaska are villages located off the road system, often resembling villages in developing countries. Frequently, Native villages are accessible only by plane, or during the winter when rivers are frozen, by snow-machine. Food, gasoline, and other necessities are expensive and often in short supply. Subsistence hunting, fishing, and gathering are a part of everyday life. Villages are politically independent from one another, and have institutions that support that local autonomy—village councils and village Corporations.⁵ Unsurprisingly, these conditions pose significant challenges to the effective provision of public safety for Alaska Natives.

Problems with safety in Tribal communities are severe across the United States—but they are systemically worst in Alaska. Most Alaska Native communities lack regular access to police, courts, and related services. Alaska Natives are disproportionately affected by crime, and these effects are felt most strongly in Native communities. High rates of suicide, alcohol abuse, crimes attributed to alcohol, and alcohol abuse-related mortality plague these communities.

In Alaska’s criminal justice system, State government authority is privileged over all other possibilities: the State has asserted exclusive criminal jurisdiction over all lands once controlled by Tribes, and it exercises this jurisdiction through the provision of law enforcement

and judicial services from a set of regional centers, under the direction and control of the relevant State commissioners. This approach has led to a dramatic under-provision of criminal justice services in rural and Native regions of the State. It also has limited collaboration with local governments (Alaska Native or not), which could be the State's most valuable partners in crime prevention and the restoration of public safety.

This is emphatically not to criticize the many dedicated and accomplished State officials who serve Alaska Native communities day in and day out. They deserve the nation's respect, and they have the Commission's.

Nonetheless, it bears repeating that the Commission's findings and conclusions represent the unanimous view of nine independent citizens, Republicans and Democrats alike, that Alaska's approach to criminal justice issues is fundamentally on the wrong track. The status quo in Alaska tends to marginalize—and frequently ignores—the potential of tribally based justice systems, as well as intertribal institutions and organizations to provide more cost-effective and responsive alternatives to prevent crime and keep all Alaskans safer. If given an opportunity to work, Tribal approaches can be reasonably expected to work better—and at less cost.

Because of the Alaska Native Claims Settlement Act of 1971 (ANCSA) and *Alaska v. Native Village of Venetie Tribal Government*⁴, the Alaska Attorney General takes the view that there is very little Indian country in Alaska and thus, its law enforcement authority is exclusive throughout the State because Tribes do not have a land base on which to exercise any inherent criminal jurisdiction.

The Commission respectfully and unanimously disagrees.

Accordingly, the Commission recommends:

2.1: *Congress should overturn the U.S. Supreme Court's decision in Alaska v. Native Village of Venetie Tribal Government, by amending ANCSA to provide that former reservation lands acquired in fee by Alaska Native villages and other lands transferred in fee to Native villages pursuant to ANCSA are Indian country.*

2.2: *Congress and the President should amend the definitions of Indian country to clarify (or affirm) that Native allotments and Native-owned town sites in Alaska are Indian country.*

2.3: *Congress should amend the Alaska Native Claims Settlement Act to allow a transfer of lands from Regional Corporations to Tribal governments; to allow transferred lands to be put into trust and included within the definition of Indian country in the Federal criminal code; to allow Alaska Native Tribes to put tribally owned*

fee simple land similarly into trust; and to channel more resources directly to Alaska Native Tribal governments for the provision of governmental services in those communities.

2.4: *Congress should repeal Section 910 of Title IX of the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments), and thereby permit Alaska Native communities and their courts to address domestic violence and sexual assault, committed by Tribal members and non-Natives, the same as now will be done in the lower 48.*

2.5: *Congress should affirm the inherent criminal jurisdiction of Alaska Native Tribal governments over their members within the external boundaries of their villages.*

CHAPTER 3—STRENGTHENING TRIBAL JUSTICE: LAW ENFORCEMENT, PROSECUTION, AND COURTS

Parity in Law Enforcement. A foundational premise of this report is that Indian Tribes and nations throughout our country would benefit enormously if locally based and accountable law enforcement officers were staffed at force levels comparable to similarly situated communities off-reservation. From 2009-2011, the Office of Justice Services (OJS) in the Bureau of Indian Affairs (BIA) increased staffing levels on four Indian reservations to achieve such parity. This approach—through a “High Performance Priority Goal” (HPPG) Initiative—on average, reduced crime significantly on the selected reservations.

While the HPPG Initiative demonstrates what can work in Indian country, the Commission hastens to note that HPPG’s results can neither be replicated nor sustained on very many other Tribal reservations due to the extremely limited Federal and State funding options currently available to Indian country. Despite the current budget reality, the results of the HPPG Initiative should not be forgotten: parity in law enforcement services prevents crime and reduces violent crime rates.

In P.L. 85-280 States, the Federal government has transferred Federal criminal jurisdiction on Indian lands to State governments and approved the enforcement of a State’s criminal code by State and local law enforcement officers in Indian country. As a consequence of P.L. 85-280 and similar settlement acts, Federal investment in Tribal justice systems has been even more limited than elsewhere in Indian country. Nor is much help forthcoming from State governments; they have found it difficult to satisfy the demands of what is essentially an unfunded Federal mandate.

Accordingly, the Commission recommends:

3.1: Congress and the executive branch should direct sufficient funds to Indian country law enforcement to bring Indian country's coverage numbers into parity with the rest of the United States. Funding should be made equally available to a) Tribes whose lands are under Federal criminal jurisdiction and those whose lands are under State jurisdiction through P.L. 83-280 or other congressional authorization; b) Tribes that contract or compact under P.L. 93-638 and its amendments or not; and c) Tribes that do or do not opt out (in full or in part) from Federal or State criminal jurisdiction as provided in Recommendation 1.1 of this report.

Data Deficits. When Tribes have accurate data, they can plan and assess their law enforcement and other justice activities. Without data and access to such data, community assessment, targeted action, and norming against standards are impossible. The Commission found that systems for generating crime and law enforcement data about Indian country either are nascent or undeveloped.

Accordingly, the Commission recommends:

3.2: To generate accurate crime reports for Indian country, especially in Tribal areas subject to P.L. 83-280, Congress should amend the Federal Bureau of Investigation (FBI) Criminal Justice Information Services reporting requirements for State and local law enforcement agencies' crime data to include information about the location at which a crime occurred and on victims' and offenders' Indian status. Similarly, it should require the U.S. Department of Justice (DOJ) to provide reservation-level victimization data in its annual reports to Congress on Indian country crime. Congress also should ensure the production of data and data reports required by the Tribal Law and Order Act of 2010, which are vital to Tribes as they seek to increase the effectiveness of their law enforcement and justice systems, by allowing Tribal governments to sue the U.S. Departments of Justice and the Interior should they fail to produce and submit the required reports.

Special Assistant U.S. Attorneys ("SAUSAs"). The Indian country SAUSA program makes it possible for U.S. Attorneys to appoint appropriately qualified prosecutors to work in the capacity of an Assistant U.S. Attorney for the prosecution of certain Indian country cases. The SAUSA model is a positive and worthwhile development in making Indian country safer. SAUSAs boost Tribal prosecutors' ability to protect and serve. SAUSAs sometimes work with their respective U.S. Attorney's Offices to refer cases arising on Indian lands so that the investigations do not fall through the cracks. Further, all Tribal SAUSAs are required to undergo a rigorous FBI background check prior to their appointment. This vetting allows SAUSAs to legally obtain access to Law Enforcement Sensitive information. Such information helps determine how Tribal prosecutors allocate resources and implement their public safety priorities.

Despite better utilization of the SAUSA program in recent years, a more fundamental issue remains: Federal agencies' stingy support of Tribal court proceedings. Many Federal officials still see information sharing with Tribal prosecutors' offices as more or less optional. Routine refusal by many Federal law enforcement officials to testify as witnesses in Tribal court proceedings stymies the successful prosecution of Indian country crime.

Accordingly, the Commission recommends:

3.3: The Attorney General of the United States should affirm that federally deputized Tribal prosecutors (that is, those appointed as Special Assistant U.S. Attorneys or "SAUSAs" by the U.S. Department of Justice pursuant to existing law) should be presumptively and immediately entitled to all Law Enforcement Sensitive information needed to perform their jobs for the Tribes they serve.

3.4: The U.S. Attorney General should clarify the ability and importance of Federal officials serving as witnesses in Tribal court proceedings and streamline the process for expediting their ability to testify when subpoenaed or otherwise directed by Tribal judges.

3.5: To further strengthen Tribal justice systems, the Commission suggests that Federal public defenders, who are employees of the judicial branch of the Federal government within the respective judicial districts where they serve, consider developing their own program modeled on Special Assistant U.S. Attorneys.

Federal Magistrate Judges. TLOA directs the Commission to consider enhanced use of Federal magistrate judges to improve justice systems. The Commission has considered the concept of cross-deputizing Tribal court judges to serve as "Special Federal Magistrate Judges" to help expedite Federal criminal investigations, arrests, and indictments of crimes occurring in Indian country. However, despite repeated attempts to garner opinions on this topic, there was no public testimony on this topic.

While Federal magistrate judges play an important role in Indian country, there are obviously many instances where only an Article III judge can perform certain functions in Indian country that are required by law. Yet, not one U.S. District Court Judge is permanently based in Indian country, nor are there any Federal courthouses there.

Accordingly, the Commission recommends:

3.6: Congress and the executive branch should encourage U.S. District Courts that hear Indian country cases to provide more judicial services in and near Indian country. In particular, they should be expected to hold more judicial proceedings in and near Indian country. Toward this end, the U.S. Supreme Court and the Judicial

Conference of the United States should develop a policy aimed at increasing the Federal judicial presence and access to Federal judges in and near Indian country.

3.7: Congress and the executive branch should consider commissioning a study of the usefulness and feasibility of creating Special Federal Magistrate Judges.

Federal Funding and Federal Administrative Reform. The Roadmap sets forth a vision of Tribal governments having the lead role in strengthening Tribal justice. To achieve this goal, they must be able to communicate clearly and effectively with their Federal and State government partners about their justice capabilities and needs.

Most Tribal governments need financial support and a more rational Federal administrative structure for the management of criminal justice programs in Indian country. The need for resources is obvious if Tribes are to pursue successful strategies such as the HPPG Initiative. Administrative changes at the Federal level should make it possible to redirect spending that at present is duplicative, over managed, and misallocated. Thus, reform may not only improve information sharing, but also generate savings so that less “new money” is needed for investment in ideas that work.

Since the late 1980s, the U.S. Department of Justice (DOJ) has become a major funder of Indian country criminal justice system activities. DOJ’s involvement has been of great benefit to Tribes in areas such as program development and opening certain funding streams.

Despite these benefits, DOJ’s grant-based funding approach creates uncertainties in system planning; Tribal governments legitimately ask why—unlike their State and local counterparts—should they rely on such inconsistent sources to pay for governmental functions. Grant funding also requires Tribal governments to compete for and “win” grant funds, which means other Tribes did not. Further, small Tribes and Tribes with thinly stretched human capital lack the capacity to write a “winning” application, yet these Tribes often have disproportionate criminal justice needs. Finally, many grants awarded to Tribes contain so much bureaucratic red tape that the balance of the Federal funds awarded goes unused.

Additionally, Tribes must navigate the separate DOJ and U.S. Department of Interior (DOI) systems, which have substantial roles in the administration of Indian country justice programming. This arrangement creates costly duplication, confusion concerning lines of accountability, and wasteful outcomes. For example, the Commission learned of detention facilities built with DOJ funds that, once completed, could not be staffed because they were not included in the DOI budget for facilities operations and maintenance.

Some of these problems could be resolved if Tribal governments were able to access DOJ Indian country resources that allow Tribal governments to manage Federal funds. An alternative and preferred route would be to merge or combine these Federal responsibilities for Indian country criminal justice in a single Federal department.

Accordingly, the Commission recommends:

3.8: Congress should eliminate the Office of Justice Services (OJS) within the Department of the Interior Bureau of Indian Affairs, consolidate all OJS criminal justice programs and all Department of Justice Indian country programs and services into a single “Indian country component” in the U.S. Department of Justice (including an appropriate number FBI agents and their support resources), and direct the U.S. Attorney General to designate an Assistant Attorney General to oversee this unit. The enacting legislation should affirm that the new agency retains a trust responsibility for Indian country and requires Indian preference in all hiring decisions; amend P.L. 93-638 so that Tribal governments have the opportunity to contract or compact with the new agency; and authorize the provision of direct services to Tribes as necessary. Congress also should direct cost savings from the consolidation to the Indian country agency and continue to appropriate this total level of spending over time.

3.9: Congress should end all grant-based and competitive Indian country criminal justice funding in DOJ and instead pool these monies to establish a permanent, recurring base funding system for Tribal law enforcement and justice services, administered by the new Tribal agency in DOJ. Federal base funding for Tribal justice systems should be made available on equal terms to all federally recognized Tribes, whether their lands are under Federal jurisdiction or congressionally authorized State jurisdiction and whether they opt out of Federal and/or State jurisdiction (as provided in Recommendation 1.1). In order to transition to base funding, the enacting legislation should:

- a. Direct the U.S. Department of Justice to consult with Tribes to develop a formula for the distribution of base funds (which, working from a minimum base that all federally recognized Tribes would receive, might additionally take account of Tribes’ reservation populations, acreages, and crime rates) and develop a method for awarding capacity-building dollars.*
- b. Designate base fund monies as “no year” so that Tribes that are unable to immediately qualify for access do not lose their allocations.*
- c. Authorize the U.S. Department of Justice to annually set aside five (5) percent of the consolidated former grant monies as a designated Tribal criminal justice system capacity-building fund,*

which will assist Tribes in taking maximum advantage of base funds and strengthen the foundation for Tribal local control.

3.10: *Congress should enact the funding requests for Indian country public safety in the National Congress of American Indians (NCAI) “Indian Country Budget Request FY 2014,” and consolidate these funds into appropriate programs within the new DOJ Tribal agency. Among other requests, NCAI directs Congress to fully fund each provision of the Tribal Law and Order Act of 2010 that authorizes additional funding for Tribal nation law and order programs, both for FY 2014 and future years; to finally fund the Indian Tribal Justice Act of 1993, which authorized an additional \$50 million per year for each of seven (7) years for Tribal court base funding; and to create a seven (7) percent Tribal set-aside from funding for all discretionary Office of Justice Programs (OJP) programs, which at a minimum should equal the amount of funding that Tribal justice programs received from OJP in FY 2010. In the spirit of NCAI’s recommendations, Congress also should fund the Legal Services Corporation (LSC) at a level that will allow LSC to fulfill Congress’ directives in the Tribal Law and Order Act of 2010 and Violence Against Women Act 2013 reauthorization.*

CHAPTER 4—INTERGOVERNMENTAL COOPERATION: WORKING RELATIONSHIPS THAT TRANSCEND JURISDICTIONAL LINES

Stronger coordination among Federal, State, and Tribal law enforcement can make Native nations safer and close the public safety gap with similarly situated communities. It also is a proven way to combat off-reservation crime. The Federal government cannot and should not force Tribal and State leaders to work together. Local priorities and concerns ought to drive cooperation, and it needs to be voluntary. But the President and Congress can take steps to promote and support the conditions in which more positive forms of collaboration can take root.

A principal goal in intergovernmental cooperation is to find the right mechanisms to facilitate the entry into Tribal-State and Tribal-Federal law enforcement agreements and Memoranda of Understanding, including Special Law Enforcement Commission and local deputization and cross-deputization agreements.

Special Law Enforcement Commission (SLEC). With a SLEC, a Tribal police officer, employed by a Tribal justice agency, can exercise essentially the same arrest powers of a Bureau of Indian Affairs (BIA) officer assigned to Indian country without compensation by the Federal government. The SLEC enables a Tribal police office to make an arrest for a violation of the General Crimes Act or the Major Crimes Act in the non-P.L. 83-280 States or Tribal jurisdictions. While the SLEC appears to be precisely the kind of intergovernmental cooperation that would greatly enhance public safety in

Indian country, the Commission heard testimony that the BIA certification of the SLEC commissions is often delayed far too long.

State and Local Agreements. The Commission believes the recognition of Tribal government and jurisdictional powers through agreements with State and local jurisdictions will develop partnerships, allow the sharing of knowledge and resources, and result in better chances to coordinate police enforcement. Greater intergovernmental cooperation often results in better services for Indian country, is more cost effective, culturally compatible, and provides better arrest and prosecution rates.

The use of Memoranda of Understanding (MOUs) or other similar agreements between local law enforcement agencies and Tribal public safety permit, or “deputize,” the Tribal officers to enforce State criminal law. In most cases, this mechanism has served to ease the burden on non-Indian police forces. It also allows a full arrest of a suspect, which is necessary to secure a crime scene, protect evidence and witnesses, and ensure an appropriate arraignment and prosecution. However, liability concerns can hinder adoption of such agreements.

Accordingly, the Commission recommends:

4.1: Federal policy should provide incentives for States and Tribes to increase participation in deputization agreements and other recognition agreements between State and Tribal law enforcement agencies.

Without limitation, Congress should:

a) Support the development of a model Tribal-State law enforcement agreement program that addresses the concerns of States and Tribes equally, to help State legislatures and Governors to formulate uniform laws to enable such MOUs and agreements, in both P.L. 83-280 and non-P.L. 83-280 States;

b) Support the training costs and requirements for Tribes seeking to certify under State agencies to qualify for peace officer status in a State in a deputization agreement;

c) Create a federally subsidized insurance pool or similar affordable arrangement for tort liability for Tribes seeking to enter into a deputization agreement for the enforcement of State law by Tribal police;

d) For Tribal officers using a SLEC, amend the Federal Tort Claims Act⁷ to include unequivocal coverage (subject to all other legally established guidelines concerning allowable claims under the Act), not subject to the discretion of a U.S. Attorney or other Federal official; and

e) Improve the SLEC process by shifting its management to the U.S. Department of Justice and directing DOJ to streamline the commissioning process (while retaining the requirements necessary to ensure that only qualified officers are provided with SLECs). (Also see Recommendation 4.8.)

Tribal Notification of Arrest, Court Proceedings, and Reentry. On the Federal side, United States Attorney's Offices sometimes do not communicate effectively, or at all, with Tribal jurisdictions when declining cases for Federal prosecution. Without notification, local Tribal courts often do not take up the case in Tribal court by exercising their concurrent jurisdiction.

Tribal government notification at the time of a Tribal citizen's arrest—and appropriate Tribal government involvement from that point forward (during trial, detention, and reentry)—can reasonably be expected to improve outcomes for the offender and for the offender's family and Tribe, as well as improve law enforcement outcomes overall.

4.2: Federal or State authorities should notify the relevant Tribal government when they arrest Tribal citizens who reside in Indian country.

4.3: When any Tribal citizen resident in Indian country is involved as a criminal defendant in a State or Federal proceeding, the Tribal government should be notified at all steps of the process and be invited to have representatives present at any hearing. Tribes should similarly keep the Federal or State authorities informed of the appropriate point of contact within the Tribe. These mutual reporting requirements will help ensure the effective exercise of concurrent jurisdiction, when applicable, and the provision of wrap-around and other governmental services to assist the offender, his or her family, as well as the victims of crime.

4.4: All three sovereigns—Federal, State, and Tribal—should enter into voluntary agreements to provide written notice regarding any Tribal citizens who are reentering Tribal lands from jail or prison. This requirement should apply regardless if that citizen formerly resided on the reservation. This policy will allow the Tribe to determine if it has services of use to the offender, and to alert victims about the offender's current status and location.

Intergovernmental Data Collection and Sharing. Good criminal justice information—and, as necessary, sharing of information—are key to the effective operation of a criminal justice program. Indian country is seen as a data gap. Some Tribes are working with State and Federal law officials on innovative ways to collect and distribute data. However, more can and should be done to encourage data sharing, particularly at the State and local level.

Accordingly, the Commission recommends:

4.5: Congress should provide specific Edward J. Byrne Memorial Justice Assistance Grants (Byrne grants) or COPS grants for data-sharing ventures to local and State governments, conditioned on the State or local government entering into agreements to provide criminal offenders' history records with federally recognized Indian Tribes with operating law enforcement agencies that request to share data about offenders' criminal records; any local, State, or Tribal entity that fails to comply will be ineligible for COPS and Byrne grants.

CHAPTER 5—DETENTION AND ALTERNATIVES: COMING FULL CIRCLE, FROM *Crow Dog* TO TLOA AND VAWA

In August 1881, *Crow Dog*, a Brule Lakota man, shot and killed Spotted Tail, a fellow member of his Tribe. The matter was settled according to long-standing Lakota custom and tradition, which required *Crow Dog* to make restitution by giving Spotted Tail's family \$600, eight horses, and a blanket. After a public outcry that the sentence was not harsher, Federal officials charged *Crow Dog* with murder in a Dakota Territory court. He was found guilty and sentenced to death. The U.S. Supreme Court ultimately affirmed Tribal jurisdiction in this case, noting that the territorial court had inappropriately measured Lakota standards for punishment “by the maxims of the white man’s morality.”⁶ Members of Congress, outraged by the Supreme Court’s ruling, overturned the decision by enacting the Major Crimes Act of 1885, which for the first time extended Federal criminal jurisdiction to a list of felonies committed on reservations by Indians against both Indians and non-Indians.

In the 130 years since, detention and imprisonment have risen in prominence as responses to crime in Indian country, and Tribal governments have struggled to reassert their views about the value of reparation, restoration, and rehabilitation.

In recent years, the TLOA and VAWA Amendments have allowed Tribal governments to regain significant authority over criminal sentencing. But more could be done. By investing in alternatives to incarceration, the Commission also is hopeful that significant cost savings in Federal and State resources can be realized.

Deficiencies in Detention. Indians who offend in Indian country and are sentenced to serve time may be held in Tribal, Federal, or State facilities. While there are hardships associated with any incarceration, American Indians and Alaska Natives serving time in State and Federal detention systems experience a particular set of problems. One is systemic disproportionality in sentencing. The other is distance from their homes.

Further, such detention systems fail to provide culturally relevant support to offenders and community reentry becomes more difficult and may be ill coordinated.

Indians offenders also could be placed in an Indian country detention facility. There is an increasing number of exemplary facilities that serve as anchors along a continuum of care from corrections to community reentry and that are able to connect detainees with core rehabilitation services. For many Tribes, financial assistance from the Federal government for facility planning, renovation, expansion, staffing, and operations has been important in these efforts.

On the other hand, eight Tribal detention facilities permanently closed between 2004 and 2012. In most cases, deficiencies in funding, staff, and appropriate space proved their undoing. Indeed, the Commission visited detention facilities with deplorable living conditions. Funding for new jails and funding for operations remains a challenge. And while the number of violent offenders in Indian country detention facilities has fallen slightly in recent years, new sentencing authorities provided by TLOA and the VAWA Amendments may result in an increased the number of violent offenders in Indian country detention facilities.

Opportunities in Alternatives. “Alternatives to incarceration” or “alternatives to detention” are programs in which a judge may send criminal offenders elsewhere instead of sentencing them to jail. By addressing the core problems that lead offenders to crime (which may include substance abuse, mental health problems, and limited job market skills) and by helping them develop new behaviors that support the choice to not commit crimes, alternative sentencing aims to create pathways away from recidivism. Jail may still be part of an offender’s experience with an alternative sentence, but it would be used more sparingly and as a shorter-term measure, functioning as a component in a more comprehensive program involving intensive supervision, coordinated service provision, and high expectations for offender accountability.

A considerable amount of data demonstrates the effectiveness of some alternatives to detention across a wide range of court settings and offense categories. Effectiveness can translate to cost savings. Governments save money by diverting offenders away from jail and into alternative programs.

Accordingly, the Commission recommends:

5.1: Congress should set aside a commensurate portion of the resources (funding, technical assistance, training, etc.) it is investing in reentry, second-chance, and alternatives to incarceration monies for Indian country, and in the same way it does for State governments, to help ensure that Tribal government funding for these purposes is ongoing. In line with the Commission’s overarching

recommendation on funding for Tribal justice, these resources should be managed by the recommended Indian country unit in the U.S. Department of Justice and administered using a base funding model. Tribes are specifically encouraged to develop and enhance drug courts, wellness courts, residential treatment programs, combined substance abuse treatment-mental health care programs, electronic monitoring programs, veterans' courts, clean and sober housing facilities, halfway houses, and other diversion and reentry options, and to develop data that further inform the prioritization of alternatives to detention.

To increase intergovernmental collaboration, as suggested elsewhere in this report, Tribal, State, and Federal governments should collaborate to ensure that Tribal governments are knowledgeable about which of its citizens are in the custody of non-Tribal governments. This would afford each offender's Tribal government the option to be engaged in decision making regarding corrections placement and supervision and allow the nation to be informed about, and prepared for, the offender's eventual reentry to the Tribal community.

Accordingly, the Commission recommends:

5.2: Congress should amend the Major Crimes Act, General Crimes Act, and P.L. 83-280 to require both Federal and State courts exercising transferred Federal jurisdiction 1) to inform the relevant Tribal government when a Tribal citizen is convicted for a crime in Indian country, 2) to collaborate, if the Tribal government so chooses, in choices involving corrections placement or community supervision, and 3) to inform the Tribal government when that offender is slated for return to the community.

Tribes must receive a fair share of funds available at the Federal level for corrections systems creation and operation. While some corrections funds are specifically designated for Tribes, most are allocated in a manner that privileges State and local governments above Tribal governments. Savings realized through the creation and increased use of alternatives to detention should not be lost to Tribal governments, which is the case today. Instead, funding should “follow the offender,” so that if an offender's time served is reduced, money that would have been spent on detention is then available for service provision.

Accordingly, the Commission recommends:

5.3: Recognizing that several Federal programs support the construction, operation, and maintenance of jails, prisons, and other corrections programs that serve offenders convicted under Tribal law, appropriate portions of these funds should be set aside for Tribal governments and administered by a single component of the U.S. Department of Justice. This includes any funds specifically intended

for Tribal jails and other Tribal corrections programs (e.g., those available through the Bureau of Indian Affairs) and a commensurate Tribal share of all other corrections funding provided by the Federal government (e.g., Bureau of Prisons funding and Edward J. Byrne Memorial Justice Assistance Grants/JAG program funding). To the extent that alternatives to detention eventually reduce necessary prison and jail time for Tribal-citizen offenders, savings should be reinvested in Indian country corrections programs and not be used as a justification for decreased funding.

5.4: *Given that even with a renewed focus on alternatives to incarceration, Tribes will continue to have a need for detention space:*

a) Congress and the U.S. Department of Justice should provide incentives for the development of high-quality regional Indian country detention facilities, capable of housing offenders in need of higher security and providing programming beyond “warehousing,” by prioritizing these facilities in their funding authorization and investment decisions; and,

b) Congress should convert the Bureau of Prisons pilot program created by the Tribal Law and Order Act into a permanent programmatic option that Tribes can use to house prisoners.

CHAPTER 6—JUVENILE JUSTICE: FAILING THE NEXT GENERATION

Indian country juvenile justice exposes the worst consequences of our broken Indian country justice system. Native youth are among the most vulnerable group of children in the United States. In comparison to the general population, poverty, substance abuse, suicide, and exposure to violence and loss disproportionately plague Native youth. Not surprisingly, and detailed in the Roadmap, these conditions negatively influence how Native children enter adulthood.

The same complexities and inadequacies of the Indian country adult criminal justice impair juvenile justice as well. The Federal court system has no juvenile division—no specialized juvenile court judges, no juvenile probation system. The U.S. Bureau of Prisons has no juvenile detention, diversion, or rehabilitation facilities. For Indian country youth who become part of State juvenile justice systems, there is generally no requirement that a child’s Tribe be contacted if an Indian child is involved. Thus, the unique circumstances of Native youth are often overlooked and their outcomes are difficult to track. Juveniles effectively “go missing” from the Tribe.

Although data about Indian country juveniles in Federal and State systems are limited, the available data reveal alarming trends regarding processing, sentencing, and incarceration of Native youth. Native youth are overrepresented in both Federal and State juvenile justice systems and receive harsher sentences.

Jurisdiction Reforms for Native Youth. Just as Tribal self-determination and local control are the right goals for adult criminal matters, they are the right goals for juvenile matters.

Accordingly, the Commission recommends:

6.1: *Congress should empower Tribes to opt out of Federal Indian country juvenile jurisdiction entirely and/or congressionally authorized State juvenile jurisdiction, except for Federal laws of general application.*

Analogous to the mechanism set forth in Chapter 1 (Jurisdiction: Bringing Clarity Out of Chaos), for any Tribe that exercises this option, Congress would recognize the Tribe's inherent jurisdiction over those juvenile matters, subject to the understanding that the Tribe would afford all constitutionally guaranteed rights to the juveniles brought before the Tribal system, and the juveniles would be entitled to Federal civil rights review of any judgments entered against them in a newly created United States Court of Indian Appeals. As in adult criminal court, the Tribe opting for this exclusive jurisdiction could offer alternative forms of justice, such as a juvenile wellness court, a teen court, or a more traditional peacemaking process, as long as the juvenile properly waived his or her rights.

If Tribes choose not to opt out entirely from the Federal criminal justice system for offenses allegedly committed by their juvenile citizens, Tribal governments should still be provided with a second option:

6.2: *Congress should provide Tribes with the right to consent to any U.S. Attorney's decision before Federal criminal charges against any juvenile can be filed.*

The U.S. Criminal Code already provides for such Tribal governmental consent in adult cases where Federal prosecutors are considering seeking the death penalty. The same reasoning ought to apply to U.S. Attorneys' decisions to file Federal charges against Native juveniles for Indian country offenses.

Strengthening Tribal Justice for Native Youth. Similarly, in the interests of achieving parity between Tribal and non-Indian justice systems, resources for Indian country juvenile justice must be more effectively deployed.

Accordingly, the Commission recommends:

6.3: *Because resources should follow jurisdiction, and the rationale for Tribal control is especially compelling with respect to Tribal youth, resources currently absorbed by the Federal and State systems should flow to Tribes willing to assume exclusive jurisdiction over juvenile justice.*

6.4: *Because Tribal youth have often been victimized themselves, and investments in community-oriented policing, prevention, and treatment produce savings in costs of detention and reduced juvenile and adult criminal behavior, Federal resources for Tribal juvenile justice should be reorganized in the same way this Commission has recommended for the adult criminal justice system. That is, they should be consolidated in a single Federal agency within the U.S. Department of Justice, allocated to Tribes in block funding rather than unpredictable and burdensome grant programs, and provided at a level of parity with non-Indian systems. Tribes should be able to redirect funds currently devoted to detaining juveniles to more demonstrably beneficial programs, such as trauma-informed treatment and greater coordination between Tribal child welfare and juvenile justice agencies.*

6.5: *Because Tribal communities deserve to know where their children are and what is happening to them in State and Federal justice systems, and because it is impossible to hold justice systems accountable without data, both Federal and State juvenile justice systems must be required to maintain proper records of Tribal youth whose actions within Indian country brought them into contact with those systems. All system records at every stage of proceedings in State and Federal systems should include a consistently designated field indicating Tribal membership and location of the underlying conduct within Indian country and should allow for tracking of individual children. If State and Federal systems are uncertain whether a juvenile arrested in Indian country is in fact a Tribal member, they should be required to make inquiries, just as they are for dependency cases covered by the Indian Child Welfare Act.*

6.6: *Because American Indian/Alaska Native children have an exceptional degree of unmet need and the Federal government has a unique responsibility to these children, a single Federal agency should be created to coordinate the data collection, examine the specific needs, and make recommendations for American Indian/Alaska Native youth. This should be the same agency within the U.S. Department of Justice referenced in Recommendation 6.4. A very similar recommendation can be found in the 2013 Final Report of the Attorney General's National Task Force on Children Exposed to Violence.*

“... data show that Federal and State juvenile justice systems take Indian children, who are the least well, and make them the most incarcerated. Furthermore, conditions of detention often contribute to the very trauma that Native children experience. Detention is often the wrong alternative for Indian country youth and should be the last resort.”

Detention and Alternatives for Native Youth. Alternatives to detention are even more imperative for Tribal youth than for adult offenders. Experts in juvenile justice believe detention should be a rare and last resort for *all* troubled youth, limited to those who pose a safety risk or cannot receive effective treatment in the community. More specifically, data show that Federal and State juvenile justice systems take Indian children, who are the least well, and make them the most incarcerated. Furthermore, conditions of detention often contribute to the very trauma that Native children experience. Detention is often the wrong alternative for Indian country youth and should be the last resort.

Accordingly, the Commission recommends:

6.7: *Whether they are in Federal, State, or Tribal juvenile justice systems, children brought before juvenile authorities for behavior that took place in Tribal communities should be provided with trauma-informed screening and care, which may entail close collaboration among juvenile justice agencies, Tribal child welfare, and behavioral health agencies. A legal preference should be established in State and Federal juvenile justice systems for community-based treatment of Indian country juveniles rather than detention in distant locations, beginning with the youth's first encounters with juvenile justice. Tribes should be able to redirect Federal funding for construction and operation of juvenile detention facilities to the types of assessment, treatment, and other services that attend to juvenile trauma.*

6.8: *Where violent juveniles require treatment in some form of secure detention, whether it be through BOP-contracted State facilities, State facilities in P.L. 83-280 or similar jurisdictions, or BIA facilities, that treatment should be provided within a reasonable distance from the juvenile's home and informed by the latest and best trauma research as applied to Indian country.*

Intergovernmental Cooperation for Native Youth. Where juveniles are involved, intergovernmental cooperation can enable Tribes to ensure that their often-traumatized youth receive proper assessment and treatment that is attentive to the resources and healing potential of Tribal cultures. Yet, Federal law, as prescribed by the Federal Delinquency Act, limits the ability to consider Tribal law and the unique needs and circumstances of a juvenile offender, particularly if that offender may be tried as an adult.

Accordingly, the Commission recommends:

6.9: *The Federal Delinquency Act, 18 U.S.C. § 5032, which currently fosters Federal consultation and coordination only with States and U.S. territories, should be amended to add "or tribe" after the word "state" in subsections (1) and (2).*

6.10: *The Federal Delinquency Act, 18 U.S.C. § 5032, should be amended so that the Tribal election to allow or disallow transfer of juveniles for prosecution as adults applies to all juveniles subject to discretionary transfer, regardless of age or offense.*

6.11: *Federal courts hearing Indian country juvenile matters should be statutorily directed to establish pretrial diversion programs for such cases that allow sentencing in Tribal courts.*

Finally, there are two key mechanisms of enhanced Tribal-State cooperation: notice to Tribes when their children enter State juvenile justice systems and opportunities for Tribes to participate more fully in determining the disposition of juvenile cases.

Accordingly, the Commission recommends:

6.12: *The Indian Child Welfare Act⁷ should be amended to provide that when a State court initiates any delinquency proceeding involving an Indian child for acts that took place on the reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all other Indian children involved in State delinquency proceedings, ICWA should be amended to require notice to the Tribe and a right to intervene.*

CONCLUSION

These recommendations are the result of Commission field hearings and site visits to all 12 of the Bureau of Indian Affairs' regions across the United States, along with hundreds of letters, emails, and other input from every corner of our country. They are intended to make Native America safer and more just for all U.S. citizens and to save taxpayers' money by replacing outdated top-down policies and bureaucracies with locally based approaches that are more directly accountable to the people who depend on them most and can make them work.

Many of these recommendations will require Federal legislation. Others are matters of internal executive branch policy. Still others will require action by the Federal judiciary. And much of what the Commission has proposed will demand enlightened and energetic leadership from the affected State governments. This includes the development of model and uniform State codes and best practices. Ultimately, Indian Tribes, nations, pueblos, villages, and rancherias must choose if and when to implement these reforms.

This is a defining moment for our nation and for this generation. How we choose to deal with the current public safety crisis in Native America—a crisis largely of the Federal government's own making over more than a century of failed laws and policies—can set our generation apart from the legacy that remains one of great unfinished challenges of the Civil Rights Movement.

Public safety in Indian country can and will improve dramatically once Native American nations and Alaska Native Tribes have greater freedom to build and maintain their own criminal justice systems. We see breathtaking possibilities for safer, strong Native communities achieved through home-grown, tribally based systems, respectful of the civil rights of all U.S. citizens, systems that reject outmoded command-and-control policies in favor of increased local control, accountability, and transparency. Lives are at stake, and there is no time to waste.

ENDNOTES

¹ Also known as the Snyder Act, the Indian Citizenship Act, 43 Stat. 253, conferred U.S. citizenship on “all non-citizen Indians born within the territorial limits of the United States,” thereby enabling Native Americans to vote in Federal elections.

² 18 U.S.C. § 1151.

³ Alaska Native Corporations are discussed in Chapter 2, notably at endnote 9.

⁴ 522 U.S. 520 (1998).

⁵ 28 U.S.C. § 1546(b)

⁶ *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883).

⁷ 25 U.S.C. § 1901 *et seq.*

ACKNOWLEDGEMENTS

The views expressed in this Roadmap by the nine appointed Commissioners of the Indian Law and Order Commission are theirs alone and do not necessarily reflect those of any other contributor. Nonetheless, the Commission wishes to acknowledge and thank the many talented and dedicated individuals who contributed to it.

Of particular note are the professional staff who were detailed from their permanent Federal employment to temporary tours of duty with the Commission. The Commission recruited each of them personally and then negotiated their public service as loaned executives:

- Jeff J. Davis, Executive Director, on leave from the United States Attorney's Office for the Western District of Michigan, Grand Rapids, MI, where he serves as an Assistant United States Attorney
- Eileen M. Garry, Deputy Executive Director, who remarkably never secured a formal detail and has continued to serve simultaneously in her permanent, full-time role as the Deputy Director of the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, Washington, DC.
- Laurel Iron Cloud, the Commission's Deputy Director, detailed from the Bureau of Indian Affairs-Office of Justice Services in Albuquerque, NM

Jeff, Eileen, and Laurel have provided enlightened and indispensable leadership throughout this project, and the Commission deeply respects their willingness to commit to such a challenging assignment.

The Commission's Advisory Committee also provided invaluable public service. Members were selected by the Commission based on dozens of applications from all 12 Bureau of Indian Affairs regions. Appendix C lists them individually. Their assistance along this journey is deeply felt and respected.

The Commission expresses its gratitude to teams from two universities who provided research and writing assistance: Miriam Jorgensen, Mary Beth Jäger, John McMinn, and Rachel Starks of the University of Arizona and Professor Angela Riley, John Haney, Addie Rockwell, and Leah Shearer of the University of California, Los Angeles (UCLA), American Indian Studies Center (AISC).

UCLA's AISC also graciously assisted the Commission at its inception, providing seed capital when Federal funding was unavailable due to delays in the budgeting process. The Commission cannot thank UCLA's AISC sufficiently for agreeing to host the permanent archive for the Commission's notes, documents, and other material.

The Commission also thanks Professor Duane Champagne of the University of California at Los Angeles for his expert advice and counsel to the Commission at the editing stage. Harriet McConnell of Greenberg Traurig LLP in Denver volunteered to cite-check the Roadmap and provided supplemental research; she was assisted by Jennifer Weddle, who co-chairs the firm's American Indian Law Practice Group. Additionally, the Chairman was aided by his colleagues at Greenberg Traurig LLP, Wendy Creason and Karen Loveland. Their help was invaluable.

John Dossett, general counsel at the National Congress of American Indians, deserves our appreciation for his assistance in strengthening the impact of the recommendations, as do NCAI Staff Attorney Katy Jackman Tyndell and NCAI Senior Communications Director, Melinda Warner for their support of the Commission.

Three Native American-owned firms, under contract to the U.S. Department of Justice, assisted in the Commission's work at various stages: Kauffman and Associates Incorporated (KAI), Agency Marketing & Business Unlimited (MABU), and Seneca Telecommunications. We thank Joann Kauffman, KAI president, and her team for exceptional web design and webpage support; Victor Paternoster and Tina Swannack, also of KAI, for travel and onsite logistical support at field hearings; Mike Mabin and Sean Fennington from MABU for travel support; and Jacqueline Jones from Seneca for overseeing the report's production, along with Harri j. Kramer, who edited the final report.

The Commission operated independently of the Federal government, yet benefitted throughout the process from strong staff leadership in Congress and in the executive branch. Similarly, many State and local officials, representatives of private and nonprofit organizations, and other stakeholders lent support at key moments.

Finally, the Commission honors the many Native American and Alaska Native nations it was privileged to visit and learn from. Every one of their stories from across our great country made a profound difference in helping the Commission think about the most positive approaches to addressing public safety in Indian country.

The risk in thanking the literally thousands of people who assisted the Commission is that naming names will cause many contributors to be overlooked. The Commission expresses sincere appreciation to everyone else who helped.



JURISDICTION: BRINGING CLARITY OUT OF CHAOS

Under the United States' Federal system, States and localities, such as counties and cities, have primary responsibility for criminal justice. They define crimes, conduct law enforcement activity, and impose sanctions on wrongdoers. Police officers, criminal investigators, prosecutors, public defenders and criminal defense counsel, juries, and magistrates and judges are accountable to the communities from which victims and defendants hail. Jails and detention centers often are located within those same communities. It's the American Way: local communities address local criminal justice problems with locally controlled and accountable institutions. In contrast, the Federal government's role is limited to enforcing laws of general application,¹ and even then, Federal agencies often work in partnership with State and local authorities.

This familiar framework stands in stark contrast to the arrangements in federally recognized Indian country, where U.S. law requires Federal and State superintendence of the vast majority of criminal justice services and programs over local Tribal governments. In recent decades, as the Tribal sovereignty and self-determination movement endorsed by every U.S. president since Richard Nixon has taken hold, Tribal governments have sought greater management of their own assets and affairs, including recovering primary responsibility over criminal justice within their local Tribal communities.

Table 1.1 Major Statutes and Cases Affecting Indian Country Criminal Jurisdiction

ACT OR CASE	REFERENCE	YEAR	DESCRIPTION
Trade and Intercourse Act	1 Stat. 137 § 137	1790	Asserts that a State can punish crimes committed by non-Indians against Indians under the laws of the State.
General Crimes Act	18 U.S.C. § 1817	1817	General Federal laws for the punishment of non-Indian crimes are upheld on Tribal lands; Indian offenses remain under Tribal jurisdiction.
Assimilative Crimes Act	18 U.S.C. § 15	1825	Extends coverage through Federal enforcement of certain state criminal laws in certain Federal enclaves.
<i>Worcester v. Georgia</i>	51 U.S. (6 Pet.) 515	1832	State laws have no rule of force in Indian country
<i>United States v. McBratney</i>	104 U.S. 621	1881	Provides for exclusive State criminal jurisdiction over crimes between non-Indians for offenses committed in Indian country; rule later extended for “victimless” crimes.
<i>Ex parte Crow Dog</i>	109 U.S. 556	1885	Reaffirms Tribal self-governance and the absence of State jurisdictional authority in Indian country, as well as Federal jurisdiction in cases of intra-tribal crimes.
Major Crimes Act	18 U.S.C. § 1155	1885	Extends Federal jurisdiction to include authority over Indians who commit 7 (later amended to 16) felonies.
<i>United States v. Kagama</i>	118 U.S. 375	1886	Upholds the Major Crimes Act based on Congress’ plenary power over Indian affairs.
General Allotment Act (Dawes Act)	25 U.S.C. § 531	1887	Created individual Indian land parcels, held in trust by the Federal government for individual Indians and Indian households, out of reservation lands, eventually leading to so-called “checker-boarded” jurisdiction as some parcels moved from trust to fee status.
Indian Country Act	18 U.S.C. § 1151	1948	Defines the scope of Federal criminal jurisdiction over Indian lands.
Public Law 85-280	18 U.S.C. § 1162; 25 U.S.C. § 1360	1953	Transfers Federal jurisdiction over Indian lands to 5 mandatory States (Alaska added upon statehood), excepting 3 Tribes, without Tribes’ consent; optional for other States, also without Tribes’ consent.
Public Law 85-280, amended	18 U.S.C. § 1162; 25 U.S.C. § 1360	1968	Allows States to request retrocession of Indian country jurisdiction (a return of jurisdiction to the Federal government).
Indian Civil Rights Act (ICRA)	25 U.S.C. § 1301	1968	Details rights Tribes must provide defendants in their courts while restricting Tribal courts to misdemeanor sentencing only.
Indian Self-Determination and Education Assistance Act	25 U.S.C. § 450	1975	Allows for the reassertion of control over Tribal services through self-governance contracts and other mechanisms.
<i>Oliphant v. Susquamish Indian Tribe</i>	435 U.S. 191	1978	Holds that Tribal courts lack any criminal jurisdiction over non-Indians for offenses committed on Indian lands.
<i>United States v. Wheeler</i>	495 U.S. 315	1978	Double jeopardy does not apply in cases subject to concurrent Federal and Tribal criminal jurisdiction.
<i>Duro v. Reina</i>	495 U.S. 676	1990	Prevents Tribal courts from exercising criminal jurisdiction over Indians who are not members of that tribe.
ICRA, amended	25 U.S.C. § 1301	1991	So-called “Duro fix” reaffirms Tribal criminal jurisdiction over all Indians, not just member Indians.
Tribal governments’ consent for federal capital punishment	18 U.S.C. § 3598	1994	Requires that no Indian may be subject to a capital sentence unless the governing body of the Tribe has first consented to the imposition of the death penalty for crimes committed on the tribe’s lands.
<i>United States v. Lara</i>	541 U.S. 195	2004	Affirms that separate Federal and Tribal prosecutions do not violate double jeopardy when a tribe prosecutes a non-member Indian.
Tribal Law and Order Act	25 U.S.C. § 2801	2010	Enhances Federal collaboration with Tribal law enforcement agencies, expands Tribal courts’ sentencing authority to felony jurisdiction by amending ICRA to permit incarceration for up to three years per offense, while allowing multiple offenses to be “stacked”
Violence Against Women Reauthorization Act	127 Stat. 54	2015	Restores Tribal criminal jurisdiction over non-Indians in Indian country for certain crimes involving domestic and dating violence and related protection orders.

Disproportionately high rates of domestic violence, substance abuse, and related violent crime within many Native nations have called into question whether the current Federal and State predominance in criminal justice jurisdiction offers Tribal nations a realistic solution to continued social distress marked by high rates of violence and crime. Federal and State agencies can be invaluable in creating effective partnerships with Tribal governments, but there is no substitute for the effectiveness of locally controlled Tribal governmental institutions that are transparent and accountable. U.S. citizens rightly cherish the value of local control: that government closest to the people is best equipped to serve them. The comparative lack of localism in Indian country with respect to criminal justice directly contravenes this most basic premise of our American democracy.²

The Tribal Law and Order Act of 2010 (TLOA) instructs the Indian Law and Order Commission (Commission) to study jurisdiction over crimes committed in Indian country, including the impact of jurisdictional arrangements on the investigation and prosecution of Indian country crimes and on residents of Indian land. Additionally, TLOA calls for studying the Indian Civil Rights Act of 1968 and its impact on the authority of Indian Tribes, the rights of defendants subject to Tribal government authority, and the fairness and effectiveness of Tribal criminal systems. Finally, TLOA directs the Commission to issue recommendations that would simplify jurisdiction in Indian country.

The Commission's primary response is to request that the President and Congress act immediately to undo the prescriptive commands of Federal criminal law and procedure in Indian country and, with the assurance that the Federal civil rights of all U.S. citizens will be protected, recognize Tribal governments' inherent authority to provide justice in Indian country.

FINDINGS AND CONCLUSIONS: INDIAN COUNTRY JURISDICTION OVER CRIMES COMMITTED IN INDIAN COUNTRY

For more than 200 years, the Federal government has undertaken to impose Federal laws, procedures, and values concerning criminal justice on American Indian nations (Table 1.1). An oft-used justification for these jurisdictional modifications is that the overlay of Federal and State law will make Indian country safer. But, in practice, the opposite has occurred. Indian people today continue to experience disproportionate rates of violent crime in their own communities. An exceedingly complicated web of jurisdictional rules, asserted by Federal and State governmental departments and agencies whose policy priorities usually pre-date the modern era of Tribal sovereignty and self-determination, contributes to what has become an institutionalized public safety crisis. The symptoms of this systemic dysfunction are painfully apparent across Indian country.

Institutional illegitimacy. Because the systems that dispense justice originate in Federal and State law rather than in Native nation choice and consent, Tribal citizens tend to view them as illegitimate; these systems do not align with Tribal citizens' perceptions of the appropriate way to organize and exercise authority. The Commission heard this observation at virtually every one of its field hearings from the Eastern United States to Alaska. Generally, members do not willingly comply with decisions that have not won their consent.

Because Tribal nations and local groups are not participants in the decision making, the resulting Federal and State decisions, laws, rules, and regulations about criminal justice often are considered as lacking legitimacy. As widely reported in testimony to the Commission, nontribally administered criminal justice programs are less likely to garner Tribal citizen confidence and trust, resulting in diminished crime-fighting capacities. The consequences are many: victims are dissuaded from reporting and witnesses are reluctant to come forward to testify. In short, victims and witnesses frequently do not trust or agree with State or Federal justice procedures. Potential violators are undeterred.⁵

When Federal and State criminal justice systems treat Tribal citizens unfairly or are widely perceived as doing so, trust and confidence in the law erode further. Crime victims, witnesses, and defendants often must travel to far-off courthouses for their cases and testimony to be heard. Colorado is a case in point.⁴ The two Indian nations headquartered within the State's boundaries, the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe, are located between 7 and 10 hours' drive across the Rocky Mountains from Denver, where the entire U.S. District Court is housed in a single Federal courthouse.⁵

Tribal citizens are transported, often at their own expense, to nonlocal court venues, where trials are conducted according to the procedures and methods of adversarial justice, and where the process of assigning punishments can be foreign to Tribal cultures. By contrast, justice in many Tribal communities is oriented toward restoring balance and good relations among Tribal members. Victims, if possible, are restored to economic and social well-being. Offenders and their relatives strive to provide restitution to offended persons and kin. When an agreed-upon payment is found, the offender's family makes this restitution to the offended family, and the issue is at an end. Of course, this is not the case with every kind of offense or every Tribe, but the principle holds: local control for Native communities means the ability to build and operate justice systems that reflect community values and norms.

In Federal and State courts, Native defendants often are not tried by a true jury of their peers. Federal and State jury pools are drawn with little consideration of where Native people live and work. This concern also was raised repeatedly at Commission field hearings across Indian

country. Misperceptions impact every step of the process. Prosecutors may be more skeptical of Indian victims. Judges might award harsher sentences to Indian defendants because of assumptions they make about Indian country crime and those individuals involved. In the case of Federal courts, criminal sentences for the same or similar offenses are systemically longer than comparable State systems because there is no Federal parole or good-time credit even for inmates who follow the rules.

Ultimately, the inequities of Federal and State authority in Indian country actually encourage crime. The Commission received extensive testimony from Indian and non-Indians alike that Tribal citizens and local groups tend to avoid the criminal justice system by nonparticipation. Because Tribal members or relatives could be sent to prison or jail, which would have negative social and economic impacts on the family or local group, they will not bear witness against perpetrators. The punishment outcomes of the adversarial Federal and State court systems do little to heal Tribal communities and may create greater and longer disruptions within the communities.

You're going to take the Western model and put it—impose it—on Indian Country? It's never going to work.

*Anthony Brandenburg, Chief Justice, Intertribal Court for Southern California
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation
February 16, 2012*

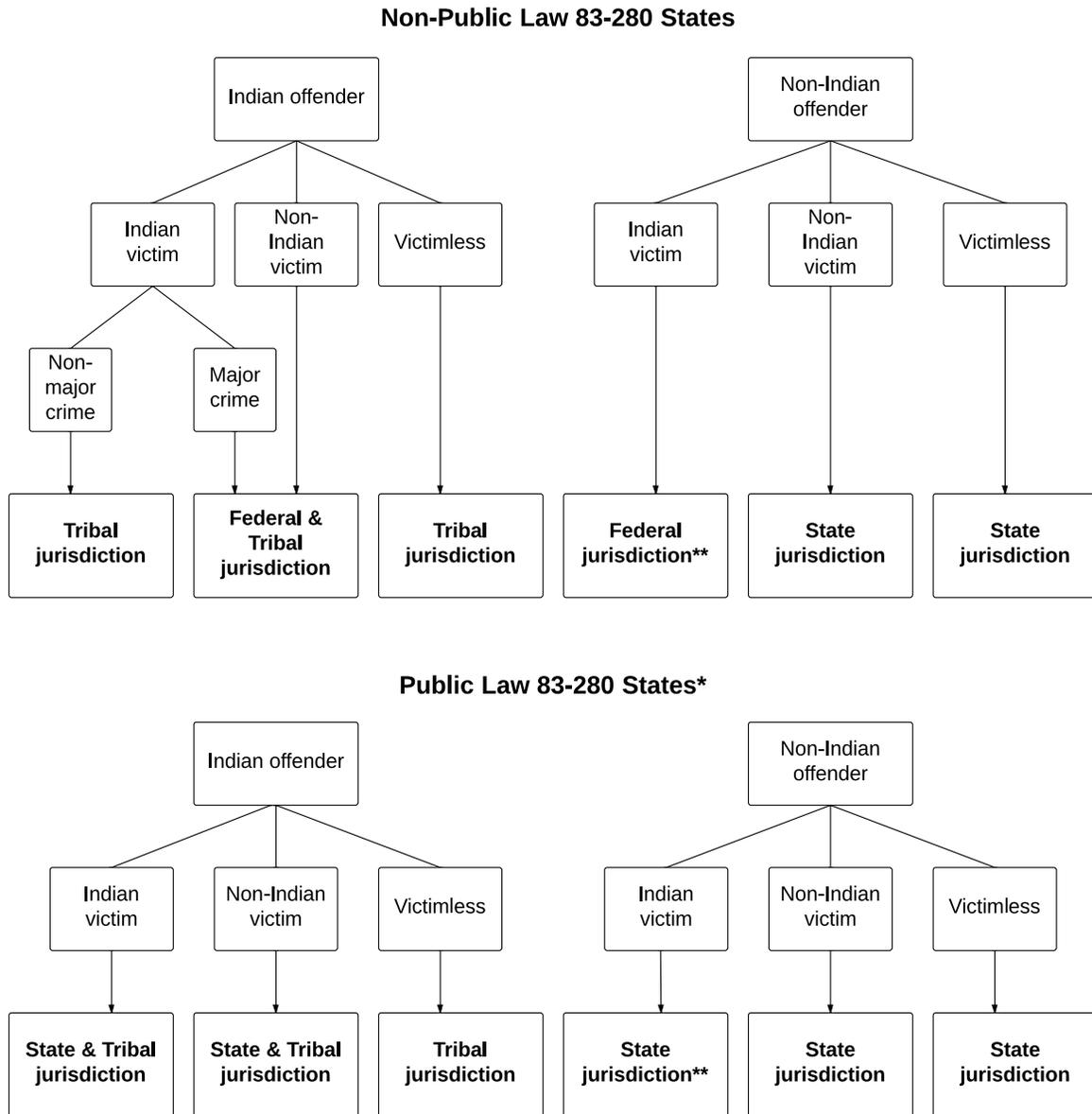
To be frank, State law enforcement in Indian country, as we learned, was viewed as an occupying force, invaders, the presence wasn't welcome. ...The common belief was that a deputy sheriff could come onto the reservation for whatever reason, [and] in handling a situation, if a condition [arose], the deputy could use any level of force necessary and then just drive away with no documentation, no justification, no accountability, and the Tribal community just had to take it.

*Ray Wood, Lieutenant, Riverside County Sheriff's Department
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation
February 16, 2012*

And I have argued, and I think it is a fair legal argument, that if you have an Indian country case, the jury must come from Indian country. That is what a jury means. A jury means representatives of the community. ...We ought to be drawing our jurors from Indian country, and we don't do that. We don't. We draw them the same way we draw every Federal jury in the Federal district courts, and that is problematic in many respects...because one of the ways that the Federal juries usually are drawn is from voter registration roles.

*Kevin Washburn, Dean, University of New Mexico School of Law
Testimony before the Indian Law and Order Commission, Hearing at Pojoaque Pueblo, April 19, 2012*

Figure 1.1 General Summary of Criminal Jurisdiction on Indian Lands
(Details vary by Tribe and State)



* Under the *Tribal Law and Order Act of 2010*, Tribes can opt for added concurrent Federal jurisdiction, with Federal consent. Neither this Tribe-by-Tribe issue nor the various configurations of "Optional 280" status is shown in this chart.

** Under the *Violence Against Women Act Reauthorization of 2013 (VAWA Amendments)*, after 2015, Tribes may exercise Special Domestic Violence Jurisdiction with the Federal government and with States for certain domestic violence crimes.

Institutional complexity. Figure 1.1 summarizes the complexity that results from the overlay and predominance of Federal and State authority over Tribal authority. Yet, the seeming order of the figure fails to capture how difficult actual implementation of this imposed legal matrix can be. Jurisdictional questions and concerns arise at every step in the process of delivering criminal justice from arrest to criminal investigation, prosecution, adjudication, and sanctions. For instance:

- Is the location in which the crime was committed subject to concurrent State criminal jurisdiction under P.L. 83-280 or other congressional provisions?
- If the State shares criminal law jurisdiction, does the Tribe also have statutes or ordinances that criminalize or penalize the action?
- Under which government's law does a law enforcement officer have the authority to make an arrest?
- If this portion of Indian country is not subject to P.L. 83-280, is the crime subject to concurrent Federal jurisdiction under the Major Crimes Act?
- If the incident does not constitute a major crime, does the Tribal nation have arrest and prosecution authority under its own statutes?
- Is the suspect a non-Indian, does a Tribal officer have the authority not only to detain, but also to arrest and charge the offender under a cooperative agreement, special Federal commission, or conferral of State peace officer status?
- Which jurisdiction has the authority to prosecute the suspect, and to whose officers should the perpetrator be turned over?
- Are there double jeopardy issues as a matter of State or Tribal law if one jurisdiction prosecutes first and the other wants to follow?
- Does the crime involve violence against women?
- If so, does that change the authority of the Tribal officer, under Tribal law, to arrest a non-Indian, no matter where the offense occurred?
- Where jurisdiction is concurrent, do available sanctions or rehabilitation options affect the choice of venue?

Essentially, the delivery of criminal justice to Indian country depends on each identified government being able and willing to fulfill its Indian country responsibilities. Any delays, miscommunications, service gaps, or policy gaps—unintentional or otherwise—threaten public safety. For example, if Tribal law enforcement officers require assistance from nontribal authorities (to turn over a suspect for arrest, for example), but those authorities are substantially delayed, Tribal police may be unable to pursue a crime any further. If police, prosecutors, and judges do not have access to another government’s criminal history information, they may not be able to act appropriately. If Federal investigators begin work on a case that is later returned to the Tribe for prosecution but Federal officials cannot share evidence, Tribal investigators will have to expend unnecessary effort to recreate it. Or, if a case is returned only after the Tribe’s statute of limitations has expired, an offender may go free.⁶ Again, the impact of federally imposed jurisdiction may likely be increased crime.⁷

The extraordinary waste of governmental resources resulting from the Indian country “jurisdictional maze” can be shocking, as is the cost in human lives. The jurisdictional problems often make it difficult or even impossible to determine at the crime scene whether the victim and suspect are “Indian” or “non-Indian” for purposes of deciding which jurisdiction—Federal, State, and/or Tribal—has responsibility and which criminal laws apply. In those crucial first hours of an investigation, this raises a fundamental question: which agency is really in charge? This is the antithesis of effective government.

An actual case involving a tragic highway accident in Colorado illustrates how overly complicated jurisdictional rules can undermine criminal investigations and hinder effective prosecutions. In *United States v. Wood*, the U.S. Attorney’s Office for the District of Colorado prosecuted a case on the Southern Ute Indian Reservation where a non-Indian drunk driver smashed into a car driven by a Tribal member.⁸ Both victims (an elderly woman—the Tribal member—and her 8-year-old granddaughter) burned to death. The child was not an enrolled member of the Tribe, but had a sufficient degree of Indian blood to be considered “Indian” for purposes of Federal criminal jurisdiction according to the legal requirements articulated over the years by the U.S. Court of Appeals for the Tenth Circuit, which hears appeals of Federal cases arising on the Southern Ute Indian Reservation. What was unclear based on the evidence available at the crime scene, however, was whether the little girl was also considered to be an “Indian” on the Southern Ute Indian Reservation—another Tenth Circuit legal requirement.

As the Federal case against the non-Indian defendant proceeded under the Major Crimes Act, defense counsel objected that the little girl, despite having Native blood, was still not considered to be an Indian by the Southern Ute Indian Tribe given her alleged lack of ties to that community. The factual record, which was unavailable to investigators in the field at the time of accident, was mixed on this issue. The girl had received

We have county law enforcement that assists the Bureau of Indian Affairs. The county is quite big. (W)e only have three county deputies who go back and forth between five different communities. So if one's on one end of the county and BIA needs assistance, they're without assistance.

*Billy Bell, Chairman, Fort McDermott Tribe, and Chairman, Intertribal Council of Nevada
Testimony before the Indian Law and Order Commission, Hearing at Salt River Reservation, AZ
January 13, 2012*

The Tribes still cannot get access to the CLETS information, which is the California Law Enforcement [Telecommunications System]. That's critical. If you are a law enforcement officer and you pull a vehicle over and...you run the plate, you are not going to get any California State information on that owner or driver that may be critical to you to better prepare yourself—to not only protect you, but the public. So not being able to get that information is critical.

*Joe LaPorte, Senior Tribal Advisor, Office of the Program Manager, Information Sharing Environment, Office
of the Director of National Intelligence
Testimony before the Indian Law and Order Commission, Hearing in Oklahoma City, OK
June 14, 2012*

Indian Health Service benefits on the Southern Ute Reservation and was visiting her grandparents on the reservation at the time of the accident. However, the girl and her mother lived off-reservation. After literally dozens of people had weighed in, eventually the question of whether the Tribe considered the child victim to be a Tribal member was resolved by the Southern Ute Tribal Council. After several months of jurisdictional wrangling, the Tribal Council concluded that the child victim was not a Tribal member—unlike her grandmother, who also had perished in the accident. This meant two separate prosecutions for the same crime: One by the U.S. Attorney’s Office for the death of the grandmother, the other by the LaPlata County, Colorado District Attorney’s Office for the child. And because of *Oliphant v. Suquamish Tribe*,⁹ the Tribe was deprived of any concurrent criminal jurisdiction because the defendant was a non-Indian.

Public Law 83-280. While problems associated with institutional illegitimacy and jurisdictional complexity occur across the board in Indian country, the Commission found them to be especially prevalent among Tribes subject to P. L. 83-280 or similar types of State jurisdiction, the latter of which tend to be Tribes in the East and South. In part, this is because State government authority often appears even less legitimate to Tribes than Federal government authority. The Federal government has a trust responsibility for Tribes, many Tribes have a treaty relationship with it,¹⁰ and there is an established government-to-government relationship between Tribes and the Federal government that has been affirmed in court decisions and through the self-determination policy declared by President Nixon in 1970.

More typically, Tribes’ widespread disenchantment with State criminal jurisdiction stems from the fact that States often have proven to be less cooperative and predictable than the Federal government in their exercise of authority. While there are exceptions, particularly within the past two decades, the general relationship can be strained to the point of dangerous dysfunction. Many States entered the Union with chartered boundaries that contained sizable Tribal lands and significant Indian populations. Tribal peoples signed treaties with the Federal government and were removed to reservations. Considerable amounts of Indian land were turned over to State governments and citizens. Memories that States and local governments actively sought reductions of Indian territories still engender distrust from Tribal governments and their citizens.

The Commission frequently was presented with official testimony (and unofficial statements during site visits and other meetings) that described how State and local governments failed to provide public safety services and actively prevented Tribal governments from exercising or developing their own capacities. This less-than-cooperative intergovernmental stance can be devastating in an environment where early misunderstandings about the stipulations of P.L. 83-280 stymied development of Tribal justice agencies through withdrawal of Federal funds (Chapter 3). The Bureau of Indian Affairs (BIA) will not fund Tribal

Public Law 83-280: Concurrent Tribal and State Jurisdiction. Public Law 83-280 (18 U.S.C. § 1162) removed Federal criminal jurisdiction over Indian country and replaced it with State criminal jurisdiction in select states. The mandatory P.L. 83-280 states are California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), Wisconsin, and Alaska. P.L. 83-280 permitted other States to assume criminal jurisdiction, either in whole or in part, over Indian country within their boundaries. The optional P.L. 83-280 states are Florida, Idaho, Iowa, Montana, and Washington.

I think the better scenario is to simply not have the State have jurisdiction and that doesn't mean that we wouldn't work with them because I think we live in a day and age where that's not possible. ... (W)e would prefer to deal with the Federal government on a government-to-government basis and then deal with the State as our neighbors, as we would do as opposed to them having jurisdiction.

*Carrie Garrow, Executive Director, Syracuse University Center for Indigenous Law, Governance, and
Citizenship
Testimony before the Indian Law and Order Commission, Hearing in Nashville, TN
July 13, 2012*

They have an Indian law subcommittee of the [California] State-Federal Judicial Council level, and...I got on it. They were asking me about Tribal courts and what I thought about whether Tribal courts have an impact, etc. I said, "Well, it has a lot to do with 280." And I'm looking around at the panel of judges, and one person opened their eyes [and asked]... "What's 280?"

*Anthony Brandenburg, Chief Justice, Intertribal Court for Southern California
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation, CA
February 16, 2012*

courts, jails, and police departments within mandatory P.L. 83-280 jurisdictions. Consequently, Tribal criminal justice administration is severely underdeveloped in P.L. 83-280 jurisdictions. State and county agencies manage criminal justice administration, while Tribal courts, police, and incarceration capabilities are largely subordinate to State agencies, non-existent, or not recognized.

Testimony before the Commission reported distrust between Tribal communities and local, non-Indian criminal justice authorities, leading to communication failures, conflict, and diminished respect. Most frequently, the Commission heard that nonresponsive State and local entities often left Tribes on their own to face the current reservation public safety crises. These findings, while anecdotal, comport with more comprehensive research in the field.¹¹

The testimony also indicated that Tribes subject to State criminal law jurisdiction through settlement agreements and other congressional enactments are obstructed from exercising any degree of local control. Witnesses from these communities, located mostly in the East and South, testified that State and local officials displayed a pronounced lack of cultural sensitivity, impatience with Tribal government authorities, and an attitude that Tribal members should assimilate with the surrounding non-Indian communities. Many Tribes reported that they have nearly given up hope they can establish their own criminal justice systems appropriate to the needs of their Tribal members or residents.

Making do with current jurisdictional arrangements. Many Tribal governments, State governments, and the Federal government have been active in making current jurisdictional structures work in this complex environment. They have developed a variety of approaches (discussed more fully in Chapter 4):

- **Cooperative agreements** (including deputization, cross-deputization, and mutual aid agreements) provide for shared law enforcement authority in and around Indian country. The most encompassing agreements cross-deputize officers, so that Federal, State, Tribal, municipal, or county officers are able to enforce a partner government's laws. For example, a Tribal police officer so cross-deputized can make an arrest based on Tribal law, certain Federal laws, or city ordinances. Such arrangements simplify law enforcement by supporting an officer's ability to intervene regardless of the crime's location or the perpetrator's or victim's identity.
- **Statutory peace officer status** is an across-the-board recognition of police officers who work for the public safety department of a federally recognized Tribe as State peace officers. Under Oregon's statute, for example, Tribal police are empowered to arrest non-Indians on the reservation for violations of State law and to continue

Here is a Federal mandate that we provide service to these communities, and yet we have no clue what we're doing, what our limits are. And we found that on a day-to-day basis, routinely, our officers were going into Indian country and making huge mistakes. Not just cultural mistakes, not just historical mistakes, but legal mistakes utilizing California regulatory law and enforcing it in Indian country because we didn't know.

*Lt. Ray Wood, Tribal Liaison Unit Commander, Riverside County Sheriff's Department
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation, CA
February 16, 2012*

At the [Washington] State Supreme Court there was an initial decision finding the officer had authority to arrest in fresh pursuit of a crime that began on reservation. It was later reconsidered and amended, but sustained. Last week it was reconsidered again and reversed. This alone, just the result to have this happen, shows the level and depth of confusion caused by the jurisdictional maze.

*Brent Leonhard, Interim Lead Attorney, Office of Legal Counsel,
Confederated Tribes of the Umatilla Indian Reservation
Written Testimony for Indian Law and Order Commission, Hearing at Tulalip Indian Reservation, WA
September 7, 2011¹²*

[There are] people that move into those areas for that reason: they want to engage in unlawful activity. They do so because they know that there is an absence of law enforcement.

*Paul Gallegos, Humboldt County District Attorney
Testimony before the Indian Law and Order Commission, Hearing on the Agua Caliente Reservation, CA
February 16, 2012*

California does not allow Tribes into the fusion centers and does not recognize Tribal law enforcement. We hope to get this taken care of in California. A model and test case is being developed by the Sycuan Tribe. This same issue is found in New York, where the State only lets one Tribe in, but not the rest.

*Joe LaPorte, Senior Tribal Advisor, Office of the Program Manager, Information Sharing Environment, Office
of the Director of National Intelligence
Testimony before the Indian Law and Order Commission, Hearing in Oklahoma City, OK
June 14, 2012*

I think...that any time there's Federal law that [is] passed regarding Indian country, that it [should] apply to Settlement Act Tribes, plain and simple...Each Tribe doesn't have to be mentioned. That basically says, when there's Federal legislation passed, that it applies to all Indian nations, P.L. 83-280, Settlement Acts, however they want to word it. I think that is probably the first and foremost place to start. Because without that, you have different levels of sovereignty, and that's no more clear than when the State trumps the Federal government and trumps the Federal laws that are passed regarding the Indian country.

*Robert Bryant, Chief of Police, Penobscot Nation
Testimony before the Indian Law and Order Commission, Hearing in Nashville, TN
July 13, 2012*

pursuing a suspect onto an off-reservation jurisdiction and take action on crimes committed in their presence.¹⁵

- **A Special Law Enforcement Commission (SLEC)** is a type of cooperative agreement, authorized by Federal regulation, which provides authority for a State, Tribal, or local law enforcement officer to enforce certain Federal crimes committed within Indian country. Tribal or State officers who meet the SLEC requirements can be authorized to make Federal arrests. These officers are issued a SLEC card, which must be renewed (through retesting) every 3 years. To be eligible to receive SLECs, officers must be certified peace officers and pass a Federal background check. Their sponsoring agencies also must enter into an intergovernmental agreement with the Office of Justice Services (OJS), a part of BIA. The SLEC program can be enormously valuable for those Tribes that have entered into the required agreements with OJS. However, a major obstacle to the widespread use of the program—for both new SLEC cards and card renewals—has been the lack of access to SLEC testing and training, which historically was provided almost exclusively at the BIA Indian Police Academy in Artesia, NM. An off-site SLEC training program piloted in Colorado, which formed the basis for the expanded on-reservation SLEC training provisions contained in the Tribal Law and Order Act, resulted almost immediately in increased Federal prosecutions by Tribal officers who otherwise would lack the power to arrest non-Indians suspected of committing Federal crimes.¹⁴ TLOA encourages all U.S. Attorney’s Offices to partner with OJS to provide expanded SLEC training and testing for Indian country.
- **Cooperative prosecutorial arrangements** allow Tribal, Federal, and State officials to share information and work together more closely on case investigations and prosecutions. One example is designating Tribal prosecutors to serve as “Special Assistant U.S. Attorneys” (Chapter 3).

These are promising practices. They can be vitally important for responding to the flow of crime across Indian country’s borders. For addressing public safety in Indian country, however, the Commission concludes that such practices will, at best, always be “work-arounds.” They tend to deliver suboptimal justice because of holes in the patchwork system, because bias or a lack of knowledge prevents collaboration, and/or because local politics shift.

Conclusions concerning jurisdiction. The Indian Law and Order Commission has concluded that criminal jurisdiction in Indian country is an indefensible maze of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions, and without the consent of Tribal nations. Ultimately, the imposition of non-Indian criminal justice institution in Indian country extracts a terrible

I believe that the State of Arizona is a model of how States should work with Indian country. The State under Arizona Revised Statutes 13-3874 authorizes Tribal police who meet the qualifications and training standards under Arizona Peace Officers Standards and Training (AZ POST) to exercise all law enforcement powers of peace officers in the State. ...This peace officer authority not only assists the Tribal governments it also adds more peace officers to the State.

*Edward Reina, (Ret.) Director of Public Safety, Tohono O'odham Nation
Written testimony for the Indian Law and Order Commission, Hearing at Salt River Indian Reservation
Jan. 13, 2012¹⁵*

price: delayed prosecutions, too few prosecutions, and other prosecution inefficiencies; trials in distant courthouses; justice systems and players unfamiliar with or hostile to Indians and tribes; and the exploitation of system failures by criminals, more criminal activity, and further endangerment of everyone living in and near Tribal communities. When Congress and the Administration ask why is the crime rate so high in Indian country, they need look no further than the archaic system in place, in which Federal and State authority displaces Tribal authority at the expense of local Tribal control and accountability.

When Tribal law enforcement and courts are supported—rather than discouraged—from taking primary responsibility over the dispensation of local justice, they are often better, stronger, faster, and more effective in providing justice in Indian country than their non-Native counterparts located elsewhere. After listening to and hearing from Tribal communities, the Commission strongly believes that for public safety to be achieved in Indian country, Tribal justice systems must be allowed to flourish, Tribal authority should be restored to Tribal governments when they request it, and the Federal government in particular needs to take a back seat in Indian country, enforcing only those crimes that it would enforce in any case, on or off reservation. The Federal trust responsibility to Tribes turns on the consent of Tribes, not the imposition of Federal will. The Commission also believes that what is not warranted is a top-down, prescriptive Federal solution to the problem.

FINDINGS AND CONCLUSIONS: INDIAN COUNTRY JURISDICTION AND THE INDIAN CIVIL RIGHTS ACT

In addition to its desire to protect public safety, Congress considered the overlay of Federal and State law (through P.L. 85-280) in Indian country to extend protections—similar but not identical to the Bill of Rights—to defendants, juveniles, victims, and witnesses. Its presumption was that Tribal criminal justice systems could not protect the rights of either Tribal or U.S. citizens, at least in a manner similar to the U.S. Constitution and Federal civil rights laws. The Commission has studied this and other issues in response to TLOA's directive to examine the effect of the Indian Civil Rights Act of 1968 (ICRA).

Without question, ICRA infringes on Tribal authority: it limits the powers of Tribal governments by requiring them to adhere to certain Bill of Rights protections, including the equal protection and due process clauses. At the same time, because ICRA does not incorporate certain other constitutional limitations—including the guarantee of a republican form of government, the prohibition against an established state religion, the requirement for free counsel for indigent defendants, and the right to a jury trial in civil cases—the Act may be viewed as a validation of Tribal self-government. Undoubtedly, the omissions reflect Congress' effort to respect some measure of Tribal sovereignty. Thus, while ICRA represents an

“The Indian Law and Order Commission has concluded that criminal jurisdiction in Indian country is an indefensible maze of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions, and without the consent of Tribal nations.”

ntrusion on Tribal authority, it seeks to accommodate essential differences as well.

In terms of rights protections, ICRA has had both positive and negative effects. It has reinforced basic assumptions concerning the rights of defendants charged with crimes, thereby increasing community members' and outsiders' confidence in Tribal judicial systems. Tribal courts are mindful of ICRA's value in this respect and have been faithful in enforcing it. There is little or no scholarly research or other evidence showing significant violations of ICRA by Tribal courts that go uncorrected by Tribal appellate courts; in fact, what research exists, although limited, suggests that there is no systematic problem of under-protection.¹⁶ More generally, ICRA respects the obvious reality that all Tribal citizens are likewise citizens of the United States and thereby entitled to constitutional protections against arbitrary governmental action of any kind, as (in the case of the 2013 Violence Against Women Act Amendments) are nontribal defendants whose prosecutions may now be adjudicated in Tribal criminal court proceedings.

In this regard, ICRA's failure to provide the assistance of counsel without charge to indigent defendants except for cases brought under TLOA's expanded sentencing authority is especially problematic. ICRA only bars a Tribe from denying "to any person" the right "at his own expense to have the assistance of a counsel for his defense."¹⁷ When ICRA was enacted, Congress likely did not contemplate felony prosecutions by Tribal courts, so this right to counsel, normally afforded to indigent defendants charged with a felony,¹⁸ was not included in ICRA. Similarly, the applicable Federal law at the time did not extend representation rights to misdemeanor offenders, so there was no reason for the Congress to require it of Tribes.

Since 1968, however, both Tribal and Federal practice have changed dramatically. Tribal concurrent jurisdiction over many felonies has been affirmed, and Tribes have been increasingly active in prosecuting felonies under Tribal law. On the Federal side, the right to be provided counsel is guaranteed to indigent defendants charged with misdemeanors in cases where imprisonment is a possibility.¹⁹

Moreover, the Commission heard extensive testimony from public defenders, prosecutors, and judges alike, concluding that without the right to counsel, the right to due process itself is compromised. In sum, ICRA is out of step with Tribal court practice, diverges from the now broadly accepted norm for assistance of counsel in adversarial, punitive proceedings, and fails to create a coherent body of law. In at least these ways, and excepting those cases brought under the enhanced sentencing provisions in TLOA, the Commission finds that today ICRA is insufficient for the protection of Tribal citizen rights. Significantly, the Commission also finds that amending ICRA would dovetail with accepted procedure in a growing number of Tribal courts, especially those that are operating with an increasing degree of judicial independence.

“ICRA is out of step with Tribal court practice, diverges from the now broadly accepted norm for assistance of counsel in adversarial, punitive proceedings, and fails to create a coherent body of law.”

Congress' assumption that Tribal courts would handle only misdemeanors gives rise to another contemporary problem with ICRA: its limitation on Tribal court sentencing. The original limits of 6 months' imprisonment, a \$500 fine, or both have been modified to 1 year imprisonment, a \$5,000 fine, or both. Further, if a Tribe meets standards specified in TLOA, penalties can increase to 3 years' imprisonment for up to three offenses and a \$15,000 fine, plus the opportunity to "stack" or add multiple charges for longer potential periods of incarceration. These modifications are welcome; nonetheless they are insufficient.

While the Commission notes that some Tribes do not use incarceration as a punishment (Chapter 5), these limits prevent all Tribes from meting out sentences appropriate for a major crime. These limits affect Tribal sovereignty by giving a Native nation little choice. If a Tribe wants to access a more appropriate sentence and there is concurrent jurisdiction, it must cede prosecution to the Federal government or a State government. If a too-short Tribal sentence is the only option (for example, if a concurrent authority fails to prosecute or if there is only a Tribal case), public safety and victims' rights are affected. Ultimately, the sentencing restrictions erode Tribal community members' and outsiders' confidence in Tribal governments' ability to maintain law and order in Indian country.

A specific example underscores the issue. Under Federal law, the crime "assault with a dangerous weapon"²¹ comes with the penalty of up to 10 years imprisonment. Even if a Tribe (in a non-P.L. 85-280 setting) were to adopt a statute that exactly matched the Federal crime, its prosecutor could only seek a sentence of up to 1 year in jail, or under TLOA enhanced sentencing, 3 years for a single offense. To access a longer sentence, the Tribal prosecutor must refer the case for Federal prosecution. If, however, the United States Attorney does not prosecute the crime, the only option left is for the Tribe to take the case back and prosecute with the lesser, ICRA-restricted sentence. After that short time, the perpetrator would again be at large in the community, free to commit more violence.

This is intolerable and fuels the public safety crisis in Indian country. Such disparities lead to widespread public disenchantment with the delivery of justice in Indian country, comparatively fewer Federal prosecutions, too many restrictions and constraints on the Tribal criminal justice system, and lack of confidence by victims and the Tribal community that crime will be vigorously pursued and deterred.

Several witnesses in Commission field hearings called on Congress to amend IRCA to respond to both the lack of access to indigent defense for persons charged with serious crimes in Tribal court and the limits on sentencing authority. The Commission's own recommendation, as detailed below, is to follow the path already laid down by TLOA, providing broader access to appropriate sentences to Tribes that are able to guarantee defendants' Federal constitutional rights.

Public defenders are as committed to principles of public safety as prosecutors are. We want to ensure that an individual's rights are protected all along the path of the justice system, the path for all of us, and we don't want to see people wrongfully convicted, certainly not wrongfully accused.... (W)e want to ensure that justice is done. And at Tulalip that's what we are trying to do.

*Janice Ellis, Prosecutor Tulalip Tribes
Testimony before the Indian Law and Order Commission, Hearing at Tulalip Indian Reservation
September 7, 2012*

We don't want to mistreat anybody. We want to give due process, a fair trial.

William Johnson, Chief Judge, Confederated Tribes of the Umatilla Indian Reservation²⁰

RECOMMENDATIONS

In examining the complexities and deficiencies of criminal jurisdiction in Indian country (and other affected Native communities²²), the Commission seeks to meet three objectives:

- To consider potential solutions that have the promise of practical, real-world success in reducing crime and improving the safety of all persons in Indian communities, especially for women and children;
- To proceed in a manner that respects the sovereignty and autonomy of Indian Tribes; and
- To respect and enforce the Federal constitutional rights of crime victims and criminal defendants.

Consistent with these objectives and keeping in mind the importance of Tribal consent, the Commission rejects more “work-arounds” and instead embraces a far-reaching vision of reform to Indian country criminal jurisdiction. All Indian Tribes and nations—at their own sole discretion, and on their own timetable, but consistent with the guarantees to all U.S. citizens afforded by the U.S. Constitution—should be able to “opt out” of existing schemes of imposed authority over criminal matters in Indian country and be restored to their inherent authority to prosecute and punish offenders.

1.1: Congress should clarify that any Tribe that so chooses can opt out immediately, fully or partially, of Federal Indian country criminal jurisdiction and/or congressionally authorized State jurisdiction, except for Federal laws of general application. Upon a Tribe’s exercise of opting out, Congress would immediately recognize the Tribe’s inherent criminal jurisdiction over all persons within the exterior boundaries of the Tribe’s lands as defined in the Federal Indian Country Act.²³ This recognition, however, would be based on the understanding that the Tribal government must also immediately afford all individuals charged with a crime with civil rights protections equivalent to those guaranteed by the U.S. Constitution, subject to full Federal judicial appellate review as described below, following exhaustion of Tribal remedies, in addition to the continued availability of Federal habeas corpus remedies.

1.2: To implement Tribes’ opt-out authority, Congress should establish a new Federal circuit court, the United States Court of Indian Appeals. This would be a full Federal appellate court as authorized by Article III of the U.S. Constitution, on par with any of the existing circuits, to hear all appeals relating to alleged violations of the 4th, 5th, 6th, and 8th Amendments of the U.S. Constitution by Tribal courts; to interpret Federal law related to criminal cases arising in Indian

country throughout the United States; to hear and resolve Federal questions involving the jurisdiction of Tribal courts; and to address Federal habeas corpus petitions. Specialized circuit courts, such as the U.S. Court of Appeals for the Federal Circuit, which hears matters involving intellectual property rights protection, have proven to be cost effective and provide a successful precedent for the approach that the Commission recommends. A U.S. Court of Indian Appeals is needed because it would establish a more consistent, uniform, and predictable body of case law dealing with civil rights issues and matters of Federal law interpretation arising in Indian country. Before appealing to this new circuit court, all defendants would first be required to exhaust remedies in Tribal courts pursuant to the current Federal Speedy Trial Act, 18 U.S.C. § 3161, which would be amended to apply to Tribal court proceedings to ensure that defendants' Federal constitutional rights are fully protected. Appeals from the U.S. Court of Indian Appeals would lie with the United States Supreme Court according to the current discretionary review process.²⁴

The mirror of this special circuit court jurisdiction at the Tribal court level is this: Tribal courts do not become Federal courts for general purposes. Tribes retain full and final authority over the definition of the crime, sentencing options, and the appropriate substance and process for appeals outside of the narrow jurisdiction reserved for the new Federal circuit court.

It has been argued that the government-to-government relationships between Tribes and the U.S. government mean that the U.S. Supreme Court is the appropriate initial forum for any appeal of a Tribal court decision. While this may be true in concept, the Commission also seeks to ensure that Tribal court operations continue in the smoothest manner possible and that appeals are minimally disruptive to the ongoing delivery of justice services in Tribal communities.

With 566 federally recognized tribes in the United States, the U.S. Supreme Court might be asked to hear many appeals from Indian country, but choose only a few to remain responsive to the wide array other issues and subject matters brought to its attention. Tribal courts could become paralyzed by the wait and by the loss of confidence generated by the cloud of uncertainty resulting from dozens of denied appeals. Having a panel of Article III judges²⁵—all with the highest expertise in Indian law, ruling in a forum designed in consultation between the U.S. government and Tribal governments—hear such cases first meets not only the demands of practicality, but also reinforces Tribal sovereignty.²⁶

1.3: *The Commission stresses that an Indian nation's sovereign choice to opt out of current jurisdictional arrangements should and must not preclude a later choice to return to partial or full Federal or State criminal jurisdiction. The legislation implementing the opt-out*

provisions must, therefore, contain a reciprocal right to opt back in if a Tribe so chooses.

1.4: Finally, as an element of Federal Indian country jurisdiction, the opt-out would necessarily include opting out from the sentencing restrictions of Indian Civil Rights Act (ICRA). Critically, the rights protections in the recommendation more appropriately circumscribe Tribal sentencing authority. Like Federal and State governments, Tribal governments can devise sentences appropriate to the crimes they define. In this process of Tribal code development, Tribes may find guidance in the well-developed sentencing schemes at the State and Federal levels.

The Commission recognizes that this vision of restored inherent authority for all Tribes that so choose expanded sovereignty and local control in a manner that fully protects all defendants' Federal civil rights is a long-term one. That the current system is entrenched and complex likely poses a challenge for even the most prepared Native nations. Some Tribes may decide never to go down that path. Others may prefer not to subject their justice systems to Federal judicial review. In light of this, the opt-out recommendation is designed to provide Tribes with enhanced autonomy and choice, as well as greater leverage in entering into intergovernmental agreements with Federal and State authorities. This recommendation aims to create space in Federal law for an individual Tribe to opt out of the current jurisdictional architecture at the scale and pace it chooses, based on its capacity, resources, and governance preferences.

The Commission also respects that restoration of Tribes' sovereign authority, taken away from them through a long process of subjugation and neglect, can occur only with the trust and respect of the non-Indian community, including Federal, State, and local governments, the general non-Indian population, and the urban and rural communities adjacent to or inside Indian country. That trust depends, in part, upon the sovereign Tribes protecting the rights of citizens of the Tribes, States, and the United States. Requiring Tribes that opt out in full or in part to meet the standards of the 4th, 5th, 6th, and 8th Amendments to the U.S. Constitution, as interpreted by Tribal and then Indian Circuit Court Federal judges, will go far in building that trust.

The Commission does not envision that every Tribe with the opportunity to choose which criminal jurisdiction arrangements will govern its territory will choose to operate a system entirely on its own. Choice includes the option not only to exit various federally imposed configurations, but also to collaborate with other governments. For example, if a Tribal government finds that it is serving a Tribe's needs appropriately, it may opt to continue its present cross-deputization, statutory State peace officer status, special commission, and other shared authority arrangements. Similarly, a Tribal government developing new capacity may opt for these current possibilities. The arrangements might

also include wholly new intergovernmental collaborations that Tribal governments and their partner governments devise. This is the essence of choice.

Choice also means that any expansion of jurisdiction and associated changes to Tribal justice systems need not result in the diminishment of effective, traditional components of those systems, nor diminish the opportunity to create them. Tribes would need to develop procedures by which defendants could, in a considered manner, waive their Tribal constitutional and ICRA rights—consenting to Tribal court jurisdiction—as a first step in participation on the alternative track. These alternative methods for delivering justice should be encouraged: research on the healing to wellness courts and other traditional processes suggests that they often provide the best chance to reduce recidivism and help defendants change their lives.²⁷ As a final note, nothing would prevent a Tribe from continuing to use traditional justice processes for those disputes and criminal violations that always have been under Tribal jurisdiction.

Several final comments on the Commission’s recommendations relate to applicability and funding.

First, the proposed mechanism under which Tribes can opt out of congressionally authorized State jurisdiction might appear to present an issue of federalism. The Commission believes that that is not the case; in P.L. 85-280, Congress gave more authority to the States than the U.S. Constitution requires or contemplates. Thus, the retrocession mechanism, wherein a State returns the jurisdiction back to the Federal government, was a congressionally created artifice that respected the States’ prerogatives, but was not required by any means. Indeed, in the Tribal Law and Order Act of 2010, Congress specifically allowed P.L. 85-280 Tribes to petition the Federal government to apply concurrent Federal criminal jurisdiction even while leaving the congressionally authorized State jurisdiction intact. Clearly, however, Congress has the power to take the grant of State jurisdiction over criminal prohibitory offenses back at any time. The Commission believes a Tribe should have the option of making this choice, and the Federal government should be obliged to respond.

Second, while the recommendation is for a process to be created that allows Tribes currently under Federal criminal jurisdiction, P.L. 85-280 criminal jurisdiction, or settlement State criminal jurisdiction to opt out of that jurisdiction, the Commission also recognizes the unique configuration of criminal jurisdiction in the State of Alaska. The extension of the recommendation to Alaska is that Tribes with Federal land should be afforded the same opportunities as Tribes in the lower 48 states. (More detail on Alaska and the Commission’s recommendations for that unique geographic and jurisdictional setting is provided in Chapter 2.)

Third, the Commission acknowledges that enhanced Tribal criminal justice capacities, such as law-trained judges, written codes, appropriate

jail space, etc. will increase costs for Tribes. Yet, the Commission also does not intend that only “well off” Tribes—those that could afford to develop expanded capacity on their own—be able to opt out of imposed jurisdictional arrangements. Indeed, throughout the course of its field hearings, the Commission was repeatedly struck by the number of Tribes that, despite extraordinary budget challenges, are nonetheless asserting enhanced criminal and civil jurisdiction in order to strengthen self-governance and to put even more Tribal sovereignty into action.

The Commission acknowledges the budget challenges our country faces. Nonetheless, the process Congress develops for opting out should include enhanced funding for Tribes. Over time, as less effective Federal and State systems are scaled down or even eliminated in areas where Tribes choose this path, locally controlled and accountable Tribal justice systems will save money. (More detail on the possible sources of funds is provided in Chapter 3.) However, the Commission points to the success of the Indian Self-Determination and Education Assistance Act of 1975 at transferring to Tribes money formerly spent by Federal personnel in Indian country. As Tribes reassert jurisdiction, there is broad scope across many Federal agencies to replicate these transfers.²⁸ Money should flow to the agencies and governments providing criminal justice services in Indian country, and as those agencies and government change, funding flows should change as well.

CONCLUSION

Through TLOA and the VAWA Amendments, Congress set forth a path toward greater Tribal government authority over law and justice in Tribal communities. The Commission’s recommendations strive to continue this vital work. By balancing expansion of jurisdiction as Indian nations deem themselves ready, and by protecting defendants’ individual Federal constitutional rights, through the creation of the new U.S. Court of Indian Appeals, the Commission embraces the best aspects of all three systems—Federal, State, and Tribal. By removing mandates rather than prescribing responsibility, the Commission’s approach departs from the historical pattern of dictating to Tribes. Tribes must be free to choose. By recognizing the power in local control, these recommendations provide a tribally based, comprehensive solution to the problems with law and order in Indian nations that fully comports with the American Way: Local control for local communities instead of Federal command-and-control policies.

ENDNOTES

¹The term “laws of general application” refers to laws that apply to all persons in the United States, such as anti-terrorism and racketeering laws among other offenses.

²It also runs counter to long-standing Native traditions and views. For thousands of years, Indian nations provided local management of justice; this arrangement upheld and respected each nation’s specific rights and institutional ways of providing community order and justice.

³See Carole Goldberg, *In Theory, In Practice: Judging State Jurisdiction in Indian Country*, 81 COLO. L. REV. 1027 (2010); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); AND STEWART WAKING, MIRIAM JORGENSEN, SUSAN MICHAELSON, & MANLEY BEGAY, *POLICING ON AMERICAN INDIAN RESERVATIONS* (2001), especially chapters 5 and 6, available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

⁴The Commission received similar information about Wyoming, where the Eastern Shoshone and Northern Arapaho Tribes’ reservation is located approximately 300 miles from where the U.S. District Court is based.

⁵OVERSIGHT HEARING ON FEDERAL DECLINATIONS TO PROSECUTION CRIMES IN INDIAN COUNTRY BEFORE S. COMM. ON INDIAN AFFAIRS, 110th Cong. 47 (2008) (statement of Janelle F. Doughty, Director, Department of Justice and Regulatory, Southern Ute Indian Tribe) available at 47 <http://www.indian.senate.gov/public/files/September182008.pdf> (“Trying cases that meet the elements of the Major Crimes Act 350 miles from the jurisdiction in which they occur stands as a road block to justice and must be resolved”).

⁶U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 11-252, *INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS* (2011) at 17-18, available at <http://www.gao.gov/new.items/d11252.pdf>.

⁷See Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, THE ATLANTIC, Feb. 22, 2013, available at <http://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273591/>, for an extended example of the Three Affiliated Tribes’ situation (on Fort Berthold Indian Reservation in North Dakota).

⁸This description is excerpted from S. 797, *THE TRIBAL LAW & ORDER ACT 2009: Hearing Before the S. Comm. on Indian Affairs* (2009) (statement of Troy A. Eid) at 40-41, available at <http://www.indian.senate.gov/hearings/hearing.cfm?hearingid=e655f9e2809e5476862f735da14c3a5f&witnessId=e655f9e2809e5476862f735da14c3a5f-1-5>. Chairman Eid had served as the United States Attorney for the District of Colorado when *United States v. Wood* was prosecuted.

⁹435 U.S. 191 (1978).

¹⁰The U.S. government negotiated more than 800 treaties with Indian nations from 1775 to 1871. Approximately 270 of these treaties were ratified by the U.S. Senate in compliance with the U.S. Constitution.

¹¹DUANE CHAMPAGNE & CAROLE GOLDBERG, *CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280* (2012). Among those findings echoed in Commission hearings were (1) county-State police overstepping their authority through excessive force, disrespect of Tribal law, discrimination, and arrests without proper warrants; (2) a lack of county-State police presence or minimal patrolling; (3) inadequate county-State police response; (4) a perceived lack of thoroughness and timeliness in investigations; (5) perceived poor communications by county-State police with tribal communities; (6) a lack of respect by county-State police for Tribal culture and Tribal governmental authorities; and (7) overall perceptions of unfairness.

¹²Testimony of Brent M. Leonhard, September 7, 2011, Hearing of the Indian Law and Order Commission, Tulalip Indian Reservation, at 2, WA, available at https://www.indian-lawandordercommission.com/resources/documents/ILOC%20Field%20Hearing_Tulalip-WA_090711_Testimony_BLeonhard.pdf.

¹⁵ Oregon Senate Bill 412-C (2011), amending Or. Rev. Stat. § 135.005, et. seq.

¹⁴ Doughty testimony, supra footnote 54 at 48 (detailing how the Southern Ute Indian Tribe and the U.S. Attorney’s Office for the District of Colorado created an on-site SLEC training program, approved by the BIA’s Indian Police Academy, that trained Tribal officers to make Federal arrests). Conducted in 2007-08, this pilot program trained Southern Ute law enforcement officers to act as Federal agents in investigating crimes committed on the Southern Ute Indian Reservation. The pilot program training sessions were held in the Tribe’s headquarters in Ignacio, Colorado, and taught by prosecutors from the U.S. Attorney’s Office in Denver. In her testimony, Doughty, then the Tribe’s chief law enforcement officer, describes how just months after the initial SLEC trainings were completed, Southern Ute Tribal criminal investigator Chris Naranjo used his SLEC card on May 24, 2008, to arrest a non-Indian who had serially abused his girlfriend, a Southern Ute Tribal member. Naranjo responded to a suspected domestic violence assault and was able to effectuate a Federal arrest, which the U.S. Attorney’s Office was then able to prosecute. The defendant was later convicted in U.S. District Court in Denver and imprisoned.

¹⁵ Testimony of Edward Reina, Jr., Hearing of the Indian Law and Order Commission, Salt River Indian Reservation, AZ, January 13, 2012, at 2, available at https://www.indianlawandordercommission.com/resources/documents/ILOCFH_PhxAZ_Testimony_EReina.pdf

¹⁶ THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley, eds., 2012). See especially the chapter by Mark Rosen.

¹⁷ 25 U.S.C. § 1302(a)(6).

¹⁸ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁹ Following the decisions in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), *Scott v. Illinois*, 440 U.S. 367 (1979), and *Alabama v. Shelton*, 535 US 654 (2002), the right to be provided counsel is guaranteed to indigent defendants charged with misdemeanors in cases where imprisonment is a possibility.

²⁰ Quoted in Sarah Cline, *Sovereignty under Arrest: Public Law 280 and Its Discontents*, (May, 20, 2013) (unpublished master’s thesis, Oregon State University) at 54, available at <http://ir.library.oregonstate.edu/xmlui/handle/1957/39175>.

²¹ 18 U.S.C. § 115(3)

²² Most Alaska Native villages and towns may not currently meet the definition of Indian country, but ultimately suffer from similar problems and should be afforded similar opportunities.

²⁵ 18 U.S.C § 1151.

²⁴ To respect Tribal self-governance, the enabling legislation creating this new court could clarify that Federal jurisdiction shall not extend to matters relating to Tribal elections, membership enrollment, and other matters internal to Tribal self-governance. Determinations of what constitutes an “internal matter” of a Tribe can be accomplished through in-camera (confidential with the court) proceedings that protect the integrity of Tribal customs and tradition.

²⁵ As a practical matter, this means that the President nominates the judges, the Senate confirms them, and they serve for life. Nominations would be made in consultation with Tribes and each panel would consist of at least three judges. Ideally this new Federal circuit court should be located somewhere within Indian country itself.

²⁶ It might also be reasonably expected that in making nominations to the U.S. Court of Indian Appeals, Presidents should take into consideration expertise in Indian law and legal practice. In nominating such candidates, and in the U.S. Senate’s confirmation proceedings, it seems likely that many applicants will be Native American or Alaska Natives. This would be a welcome development in a Federal court system that, since its inception in the Judiciary Act of 1789 (1 Stat 75), has been virtually devoid of any Native American or Alaska Native judges. This, too, creates institutional integrity issues that the new court would help address.

²⁷ A full discussion of this result is available in Chapter 5.

²⁸ For a complete discussion, see Kevin K. Washburn, *Federal criminal law and tribal self-termination*, 84 N.C. L. Rev. 779 (2006).



REFORMING JUSTICE FOR ALASKA NATIVES: THE TIME IS NOW

Section 205 of the Tribal Law and Order Act of 2010 (TLOA) states, *“Nothing in this Act limits, alters, expands, or diminishes the civil or criminal jurisdiction of the State of Alaska, any subdivision of the State of Alaska, or any Indian tribe in that State.”* Yet, the Indian Law and Order Commission’s opinion is that problems in Alaska are so severe and the number of Alaska Native communities affected so large, that continuing to exempt the State from national policy change is wrong. It sets Alaska apart from the progress that has become possible in the rest of Indian country. The public safety issues in Alaska—and the law and policy at the root of those problems—beg to be addressed. These are no longer just Alaska’s issues. They are national issues.

The most recent example of harmful Alaska exceptions in Federal law and policy came with the March 7, 2013 enactment of the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments). Title IX (“Safety for Indian Women”), Section 910, contains a rule that limits the Act’s “Special Domestic Violence Criminal Jurisdiction” to just 1 of the 229 federally recognized tribes in Alaska. Given that domestic violence and sexual assault may be a more severe public safety problem in Alaska Native communities than in any other Tribal communities in the United States, this provision adds insult to injury. In the view of the Commission, it is unconscionable.

Every woman you've met today has been raped. All of us. I know they won't believe that in the lower 48, and the State will deny it, but it's true. We all know each other and we live here. We know what's happened. Please tell Congress and President Obama before it's too late.

Tribal citizen (name withheld)
Statement provided during an Indian Law and Order Commission site visit to Galena, AK
October 18, 2012

The strongly centralized law enforcement and justice systems of the State of Alaska are of critical concern to the Indian Law and Order Commission. They do not serve local and Native communities adequately, if at all. The Commission believes that devolving authority to Alaska Native communities is essential for addressing local crime. Their governments are best positioned to effectively arrest, prosecute, and punish, and they should have the authority to do so—or to work out voluntary agreements with each other, and with local governments and the State on mutually beneficial terms.

While it is not within the scope of the Commission’s work to address needed reforms within Alaska’s State government, matters relating to the public safety of the Alaska Native communities are. The Commission’s study of Alaska and its recommendations to Congress and the President are focused on what can and should be done to restore and enhance authority to local Native communities.

FINDINGS AND CONCLUSIONS

Centralized administration falls short of local needs. Forty percent (229 of 566) of the federally recognized Tribes in the United States are in Alaska, and Alaska Natives represent one-fifth of the total State population.¹ Yet, these simple statements cannot capture the vastness or the Nativeness of Alaska. The State covers 586,412 square miles, an area greater than the next three largest states combined (Texas, California, and Montana).² There are only 1.26 inhabitants per square mile—as compared to 5.85 for Wyoming, which is the next least populous state.³ (See map.)

Many of the 229 federally recognized tribes are villages located off the road system and “more closely resemble villages in developing countries” than small towns in the lower 48.⁴ Frequently, Native villages are accessible only by plane, or during the winter when rivers are frozen, by snow-machine. Food, gasoline, and other necessities are expensive and often in short supply. Subsistence hunting, fishing, and gathering (caribou, moose, reindeer, beluga whale, seal, salmon, halibut, berries, greens, etc.) are a part of everyday life. While Alaska Natives constitute a majority of the rural population, each community is nonetheless quite small; typical populations are in the range of 250-300 residents, many of whom share family or clan affiliations.⁵ Villages are politically independent from one another and have institutions that support that local autonomy—village councils and village Corporations.⁶ Historically, each village has managed its own local affairs, including issues of justice, and many are seeking ways to do so again. These conditions pose significant challenges to the effective provision of public safety for Alaska Natives.

*Justice efforts, however, are often hampered.*⁷ Problems with safety in Tribal communities are severe across the United States—but they are systematically the worst in Alaska. This is evident in an array of data concerning available services, crime, and community distress.

Alaska's True Proportion to the Continental United States

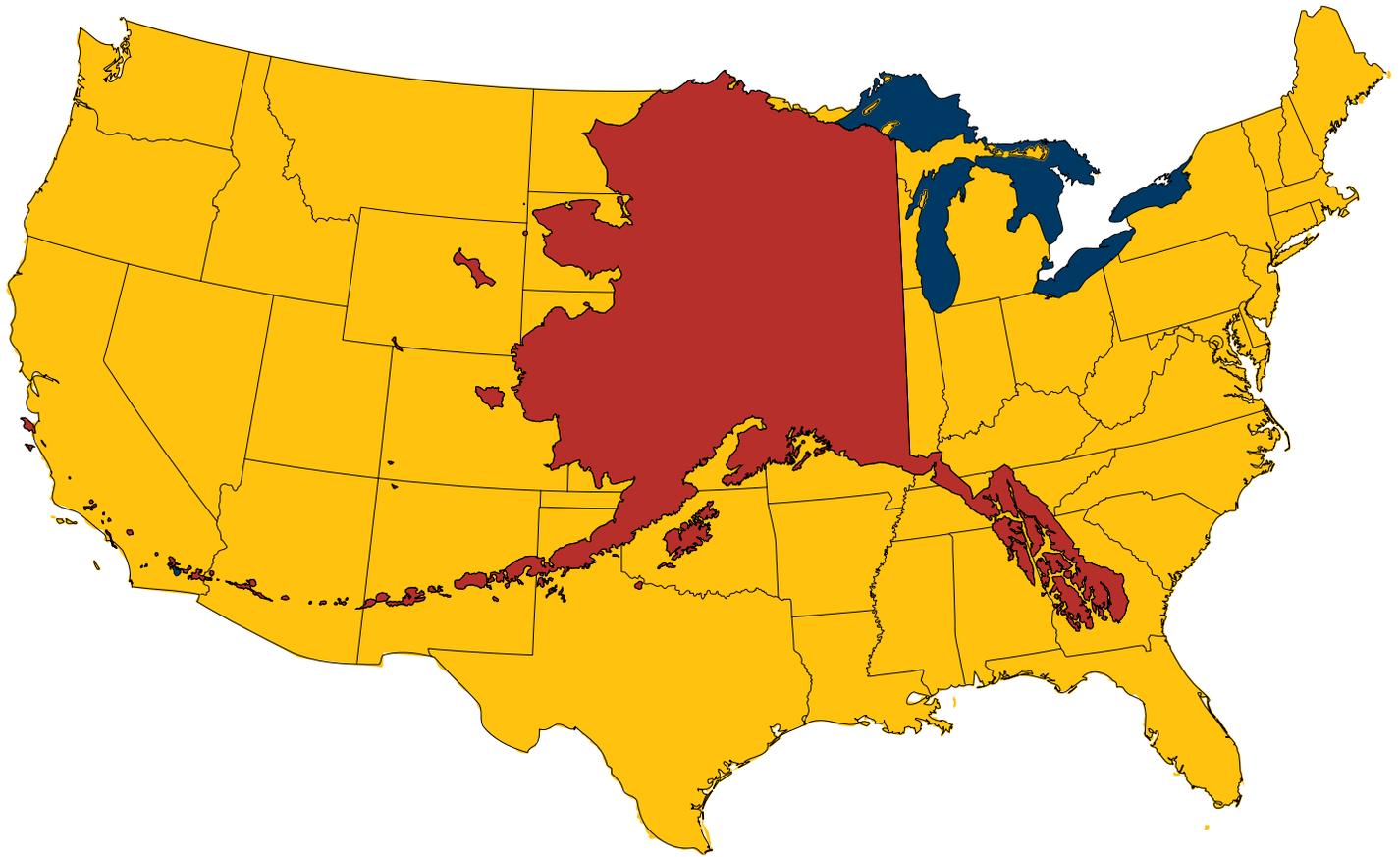


Table 2.1 Law Enforcement Personnel Serving Native Communities in Alaska

	DUTIES	TRAINING	LOCATION	FUNDED FORCE* (2011-12)	GUN?
State Troopers	Enforce all criminal laws Investigate crimes Assist other LE agencies Transport offenders Provide court security	15 weeks Accredited	Urban and rural posts across the state	373	Yes
Village Public Safety Officers (VPSOs)	Search and rescue Fire protection Emergency medical assistance Crime prevention Basic law enforcement	10 weeks	Rural villages	101	No
Village Police Officers (VPOs)	Basic law enforcement	2 weeks	Rural villages and tribes	104	Yes
Tribal Police Officers (TPOs)					

*Some positions may not be filled

Sources: (1) Division of Alaska State Troopers main website, Alaska Department of Public Safety, <http://www.dps.state.ak.us/ast/>; (2) Village Public Safety Officer Program website, Alaska Department of Public Safety, <http://www.dps.state.ak.us/ast/vpso/>; (3) *Legislative Hearing on S. 1192, Alaska Safe Families and Villages Act of 2011 and S. 1763 Stand Against Violence and Empower Native Women Act Before S. Comm. on Indian Affairs*, 112th Cong. 54 (Written Testimony of Joseph Masters, Commissioner, Alaska Department of Public Safety) (2015), available at <http://www.indian.senate.gov/hearings/loader.cfm?csModule=security/getfile&pageid=9515>

Our Tribe needs the State to recognize and respect our Tribal courts. We don't get much justice in Fairbanks.

*Curtis Summer, Vice Chairman, Tanana Village
Testimony before the Indian Law and Order Commission, Meeting in Tanana Village, AK
October 29, 2012*

Alcohol is probably 95 percent of our problem, but the State says we have no Tribal authority to fight bootlegging locally when they're hundreds of miles away—and only by airplane much of the year. The State and the Feds won't step up to prevent alcohol and drugs from flowing in here from Anchorage and Fairbanks. We're on our own, except they [the State] won't respect or enforce what we do.

*Dave Richards, City Manager, Fort Yukon, AK
Testimony before the Indian Law and Order Commission, Meeting in Fort Yukon, AK
October 30, 2012*

Most Alaska Native communities lack regular access to police, courts, and related services:

- Alaska Department of Public Safety (ADPS) officers have primary responsibility for law enforcement in rural Alaska, but ADPS provides for only 1.0–1.4 field officers per million acres.⁸ Since ADPS’s 370 officers cannot serve on a 24/7 basis, the actual ratio of officers to territory is much lower. According to ADPS, troopers’ efforts “are often hampered by delayed notification, long response distance, and the uncertainties of weather and transportation.”⁹
- Funding is available for just over 100 Village Public Safety Officers (VPSOs), although only 88 positions serving 74 communities were filled in 2011. Local Alaska Native Corporations hire VPSOs and villages have input into their selection; but, the officers actually work under Alaska State Trooper oversight. VPSO presence helps improve the coverage ratio, but technically their role is restricted to basic law enforcement and emergency first response. They do not carry firearms, although most offenders in rural villages do, a fact tragically emphasized through the death of VPSO Thomas Madole in March 2013.¹⁰
- 104 more officers serve 52 communities as Village or Tribal Police Officers, and both the Bristol Bay and North Slope Boroughs have borough-wide police departments. These officers do carry firearms, but the positions exist only in those communities with the economic resources to support them.¹¹
- At least 75 communities in Alaska lack any law enforcement presence at all.¹²
- Each of the four judicial districts in the Alaska court system serves rural Alaska, but the district courts frequently delegate responsibility to magistrates to serve low population, remote communities. Magistrates serving rural circuits visit individual communities regularly, but infrequently. Yet, often they are the sole face of the State court in Native villages.¹³
- By Federal law, Alaska Native Tribes may establish Tribal courts. As of 2012, 78 Tribes in Alaska had done so; 17 more Tribes were in the process of court development.¹⁴ However, funding constraints and narrow jurisdiction limit Alaska Tribal courts’ efforts. Not all Alaska Tribal courts are fulltime or even operated with paid staff. These courts typically address only child welfare cases, customary adoptions, public drunkenness, disorderly conduct, and minor juvenile offenses.¹⁵

[Alaska Natives experience the] highest rates of family violence, the highest rates of suicide, and the highest rates of alcohol abuse anywhere in the nation and, unfortunately, at the top of the list in Indian country in the United States. And those challenges...are exacerbated, in part, because of the enormous geographical size of Alaska, the remoteness of these communities, the skyrocketing costs of transportation, the lack of any economic opportunity, and the enormous gaps in the delivery of any form of government service, particularly from the State of Alaska.

*Mayor Bruce Botelho, Commissioner, Alaska Rural Justice and Law Enforcement Commission
Testimony before the Indian Law and Order Commission, Hearing at Tulalip Indian Reservation
September 7, 2011*

- The Emmonak Women’s Shelter, which closed for several weeks in 2012 for lack of resources, is “one of two facilities dedicated to domestic violence protection in the State. It is also the only facility located in a Native American community.”¹⁶ It is located “in a region in which there are few police officers, no transitional housing for women, and limited options for women seeking to escape.”¹⁷
- Alaska funds only 16 juvenile probation offices across all of Alaska; on average, each office’s service area is the size of Tennessee.¹⁸
- Of the 76 substance abuse treatment and/or mental health treatment centers in the State, most are in southern and southeastern Alaska, with approximately one-third in Anchorage alone; for residents of southwestern, central, and northern Alaska, help is typically provided a very long way from home.¹⁹

Alaska Natives are disproportionately affected by crime, and these effects are felt most strongly in Native communities:

- Based on their proportion of the overall State population, Alaska Native women are over-represented in the domestic violence victim population by 250 percent; they comprise 19 percent of the population, but 47 percent of reported rape victims.²⁰
- On average, in 2003-2004 an Alaska Native female became a victim of reported sexual assault or of child sexual abuse every 29.8 hours, as compared to once every 46.6 hours for non-Native females. Victimization rates, which take account of underlying population proportions, are even more dissimilar: the rate of sexual violence victimization among Alaska Native women was at least seven times the non-Native rate.²¹
- In Tribal villages and Native communities (excluding the urban Native population), problems are even more severe. Women have reported rates of domestic violence up to 10 times higher than in the rest of the United States and physical assault victimization rates up to 12 times higher.²²
- During the period 2004-2007, Alaska Natives were 2.5 times more likely to die by homicide than Alaskans who reported “White” as their race and 2.9 times more likely to die by homicide than all Whites in the United States.²⁵
- Alaska Natives’ representation in the Alaska prison and jail population is twice their representation in the general population (36 percent versus 19 percent).²⁴ Nearly 20 percent of the Alaska Natives under supervision by the Alaska State Department of Corrections are housed out of State, nearly all at Hudson Correctional Facility in New York State—4,419 road miles from Anchorage.²⁵

“It nonetheless bears repeating that the Commission’s findings and conclusions represent the unanimous view of nine independent citizens, Republicans and Democrats alike: It is the Commission’s considered finding that Alaska’s approach to criminal justice issues is fundamentally on the wrong track.”

- In Fairbanks, the city that serves a large rural and Tribal village population, Alaska Native youth who come into contact with the juvenile justice system are four times more likely than non-Natives to be referred to juvenile court and three times more likely to be sentenced to confinement.²⁶

Social distress, which can be a cause of crime or other threats to public safety, is also high among Alaska Natives and in Alaska's Tribal communities:

- The suicide rate among Alaska Natives is almost four times the U.S. general population rate, and is at least six times the national average in some parts of the State.²⁷
- In 2011, over 50 percent of the 4,499 reports of maltreatment substantiated by Alaska's child protective services and over 60 percent of the 769 children removed from their homes were Alaska Native children.²⁸
- More than 95 percent of all crimes committed in rural Alaska can be attributed to alcohol.²⁹
- The alcohol abuse-related mortality rate was 38.7 per 100,000 for Alaska Natives over the period 2004-2008, 16.1 times higher than rate for the U.S. White population over the same period.³⁰

Origins and further impacts. Why do these grave crime and safety issues persist in Alaska's tribal communities? Responsibility, it appears, lies primarily with the State's justice system.

In Alaska's criminal justice system, State authority is privileged: the State has asserted exclusive criminal jurisdiction over all lands once controlled by Tribes, and it exercises this jurisdiction through the provision of law enforcement and judicial services from a set of regional locations, under the direction and control of the relevant State commissioners. This approach has led to a dramatic under-provision of criminal justice services in rural and Native regions of the State. It also has limited collaboration with local governments (Alaska Native or not), which could be the State's most valuable partners in crime prevention and the restoration of public safety.

It is not the Commission's intent in any way to criticize the many dedicated and accomplished State officials who serve Native communities day in and day out. They deserve the nation's respect, and they have the Commission's.

Yet, control and accountability directed by local Tribes is critical for improving public safety. It brings to the table place-specific knowledge of what may work best to prevent crime and social disorder. It prioritizes the

use of scarce criminal justice resources according to community needs. It creates possibilities for intervention before disagreements or stressful situations become violent. It makes it easier for law enforcement officials to respond to crime, creates better access to the institutions of justice for victims and witnesses, and allows for trials by jury of a defendant's peers.

Through these improved means of responding to problems, de-escalating conflict, and providing justice, local control may even decrease demand for certain criminal justice services and related social services.⁵¹ By contrast, Alaska's criminal justice system can only weakly respond to crime, do little to prevent it, and ultimately, perpetuates public safety concerns.

The Commission appreciates the State of Alaska's support of the Commission's visits to the State during the course of performing its statutory duties, including, but not limited to the cooperation that Attorney General Michael Geraghty and the Alaska State Troopers repeatedly extended. Similarly, we are grateful for the senior Federal leaders who did not hesitate to enable the Commission's work or engage individual Commissioners on these important matters. Where this report differs on interpretation of law, legal issues, and policies, we want to make clear that it is not for a lack of dialogue or a willingness to engage in robust discussion and debates. (See Appendix F for letters from Attorney General Geraghty and Donald Mitchell, Esq.)

It nonetheless bears repeating that the Commission's findings and conclusions represent the unanimous view of nine independent citizens, Republicans and Democrats alike: It is the Commission's considered finding that Alaska's approach to criminal justice issues is fundamentally on the wrong track. The status quo in Alaska tends to marginalize and frequently ignores the potential of tribally based justice systems, intertribal institutions, and organizations to provide more cost-effective and responsive alternatives to prevent crime and keep all Alaskans safer. If given an opportunity to work, Tribal approaches can be reasonably expected to make all Alaskans safer—and at less cost.

The Alaska State Attorney General has reviewed the distinct history of Tribal-territorial and Tribal-State relationships regarding land occupancy, ownership, and jurisdiction for the benefit of the Indian Law and Order Commission (Appendix F). The Commission understands that from the State's perspective, Alaska's criminal justice system is rooted in U.S. statutory and case law. The Attorney General's review notes that given the U.S. Supreme Court's interpretation of the Alaska Native Claims Settlement Act of 1971 (ANCSA) in *Alaska v. Native Village of Venetie Tribal Government*,⁵² there is very little Indian country in Alaska (as defined by the Indian Country Act, 18 U.S. C. § 1151).

The Alaska Attorney General's review also emphasizes that Alaska is subject to P.L. 83-280, which assigns certain aspects of Federal jurisdiction

over Indian country to the State government.⁵³ The Attorney General takes the position that its law enforcement authority is exclusive throughout the State, maintaining that Tribes do not have a land base on which to exercise any inherent criminal jurisdiction.

In the Commission's view, each of the Attorney General's arguments is incomplete and unconvincing.

- The U.S. Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government* addressed fee land, not Alaska Native town site land or Alaska Native allotments, and a number of strong arguments can be made that this land may be taken into trust and treated as Indian country. Recently, for example, after exhaustively reviewing all the statutory authorities, a Federal court has decided that the Secretary of Interior does have authority to take land into trust in Alaska for Alaska Native communities.⁵⁴
- The State of Alaska rests its argument for exclusive criminal law jurisdiction on P.L. 83-280. Yet, courts within and outside Alaska have unanimously affirmed that P.L. 83-280 left concurrent State and inherent Tribal jurisdiction intact within Indian country. The State cannot simultaneously assert that, outside the Metlakatla Reservation, there is no Indian country in Alaska and that P.L. 83-280 prevails.
- Evidence in Alaska suggests that Tribes do have a land base on which to exercise criminal jurisdiction. At least some Alaska municipalities already are entering into agreements with Native villages that acknowledge the exclusive operation of Native law and law enforcement within overlapping municipal and village boundaries. One such example is the agreement between Alaskan city of Quinhagak and the Native Village of Kwinhagak.⁵⁵

Without doubt, the Commission understands that the structure of Alaska's criminal justice system is consistent with the overall organization of Alaska State government, which is more centralized than any other U.S. state's.⁵⁶ In Alaska, most State programs and functions operate from a designated hub or hubs, and less attention is paid in Alaska than in other States to developing local capacity. Given this orientation, when Federal policy augmented State authority to include authority over Alaska Native lands, the State reflexively absorbed and centralized that authority.

But understanding the history of Alaska's system does not imply that it should continue, especially as its population keeps growing. The serious and ongoing crime and disorder problems in rural and Native regions of the State are evidence that the system is deeply flawed and that it has failed. From the standpoint of public safety, to leave the system unchanged makes the State of Alaska's continued assertion of exclusive jurisdiction seem not only unwise, but also incautious. It also is indefensibly expensive

to all Alaskans in terms of the human and economic toll it is taking on this and future generations of Alaskans.

The VPSO and VAWA Amendment exclusions are two specific examples of way the organization and orientation of the State’s criminal justice system fail to prevent crime and imperil public safety

- **The Village Public Safety Officer position.** The VPSO position is emblematic of the deficiencies in Alaska’s criminal justice system for Tribal communities. These quasi-law enforcement field officers are paid by Alaska Native Corporations, but report to the Alaska State Patrol, and are not accountable directly to Alaska Native communities. They perform numerous nonpolicing functions, have limited training, and cannot carry firearms—despite the great volatility of many situations they encounter. There is no reason for Alaska to use this model other than cost savings. VPSOs themselves can be exceptional officers, but the plans to expand the VPSO system do not translate into the scale of public safety enhancements that are necessary.
- **The harms in the VAWA Amendments exclusion.** Title IX, Section 901 of the Violence Against Women Reauthorization Act of 2013 includes a special rule limiting the Special Domestic Violence Criminal Jurisdiction in the Act to the Metlakatla Indian Community, leaving 228 other Tribes in Alaska without its benefit. The VAWA Amendments provisions allow Tribal courts to exercise this jurisdiction even against non-Natives under certain circumstances, and in several respects may apply in the absence of Indian country (for example, when the victim is a spouse, intimate partner, or dating partner of a member of the participating Tribe). The civil provisions allowing for protective orders also are not tied to the requirement of “Indian country.” Exempting all but one of Alaska’s Tribes from this legislation deprives them—and the State overall—of an essential tool in the fight against domestic violence and sexual assault.

Furthermore, crime and safety problems are only one the system’s many negative consequences:

- Alaska’s approach to providing criminal justice services is unfair. Alaska Natives, especially those living in rural areas of the State, have not had access to the level and quality of public safety services available to other State residents or that they should rightly expect as U.S. citizens. Given the higher rates of crime that prevail in Alaska Native communities, the inequities are even greater in relative terms. The State of Alaska’s overarching lack of respect for Tribal authority further magnifies fairness concerns.

- Alaska’s approach creates and reinforces discriminatory attitudes about Alaska Natives and the governing capacities of Alaska Native Tribes. As long as the system that helped create the problems is allowed to persist, the general public will be tempted to assume that the fault lies with the victims—when instead, Alaska Natives and Alaska Native Tribal governments have had relatively little say in the way crime and justice are addressed in their communities.

- Alaska’s approach puts the State out of step with the rest of the United States and with international norms. As the State Attorney General’s letter demonstrates, Alaska steadfastly relies on ANCSA as the basis of its interactions with Tribes. But placed in context, ANCSA was the last gasp of Federal “Termination Policy,” which focused on ending government-to-government relationships with Native nations. A mere 4 years later, Congress passed the Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638), and Federal policy moved strongly in the direction of Tribal empowerment. Since then, evidence has accumulated that Tribal self-government is the best means of improving outcomes for American Indians living in Tribal communities,⁵⁷ and international law has affirmed the importance of self-determination for Indigenous peoples.⁵⁸

- Alaska’s approach will lead to significant criminal justice and litigation costs. A variety of legal rulings and court decisions underscore the strong differences of opinion about State and Tribal government powers in Alaska. These decisions include: the 133-page opinion of the Department of the Interior Solicitor in 1993 that ANCSA had not terminated villages’ status as Tribes,⁵⁹ the U.S. Supreme Court’s decision in *Venetie*, and the Alaska Supreme Court’s 1999 decision in *John v. Baker*⁴⁰ that Alaska Native Tribal courts can regulate internal domestic affairs even if Tribes do not have federally recognized Indian country. Without policy change, the future will look much like the contested past, only with much bigger and costlier problems compounded over time. As one expert has observed, “the extent of Tribal jurisdiction in Alaska is not yet clear, and will likely be the subject of State and Federal court cases for years to come.”⁴¹ Even if Alaska wins cases, the financial and social costs of litigation will be considerable and could be avoided altogether if State-Tribal relations instead were characterized by respect, mutual recognition, and partnership.

- Alaska’s approach may result in irrevocable harm. The 75 Alaska Native villages that lack any law enforcement presence must contend with the prevailing sentiment in the State, which the Commissioners frequently heard from State and Federal leaders, that they should “just move.” The Commission was told repeatedly, in other words, that many Alaska Natives should relocate to larger, semi-urban centers, where there are law enforcement,

Circle Peacemaking in the Organized Village of Kake is a community-based restorative justice process for both adults and juveniles. State judges can defer to it for sentencing decisions and community members can turn there before problems deteriorate into official concerns. Kake circle peacemaking focuses on restoring balance to offenders' lives and to healing ruptures in their family, clan, Tribe, and community relationships. While literally sitting in a circle, justice system personnel, village elders, service providers, and any interested or affected community members meet with the offender and victim(s) to “speak from the heart in a shared search for understanding of the event” and to “together identify the steps necessary to assist in healing all affected parties and prevent future crimes.” Kake Circle Peacemaking has led to decreased substance abuse, decreased offending, which is reflected in recidivism rates as much as 40 percentage points lower than the comparable State of Alaska figure, and greater Tribal self-determination.⁴⁵

One of the vehicles of change which I view as a hopeful, empowering mechanism is catching on in some villages in this region. The Western way of locking people up to sit in a jail cell and receive three meals a day and not really have to do anything meaningful to make things right is not too effective....Some of our State Magistrates and some State Judges are offering the option of the offender who has been charged and pled guilty to a misdemeanor or lower offence, to go before their home communities and be in a circle and to take ownership of their mistake in a meaningful way which can only happen in the safety and caring of a circle by the people who helped raise you. This is an example of a positive solution.

*Mishal Tooyak Gaede, Tribal Court Facilitator, Tanana Chiefs Conference
Letter to the Commission,
October 31, 2012*

One of the concluding observations I would make is that as a result of our activities within the State we become painfully aware that there was a tendency to be a wide gap between State governments and Tribal governments with regard to the roles in rural Alaska.

*Mayor Bruce Botelho, Commissioner, Alaska Rural Justice and Law Enforcement Commission
Testimony before the Indian Law and Order Commission, Hearing at Tulalip Indian Reservation
September 7, 2011*

court services, and support for victims and offenders. For communities that already are under great stress from natural resource development, environmental degradation, climate change, competition over subsistence resources, complex restrictions on subsistence activities, high prices for food and fuel, and substandard housing and sanitation conditions, this relatively callous attitude toward village public safety may be the final straw, leading to the dissolution of villages and the abandonment of life ways forged in the crucible of the Arctic thousands of years ago. While cultural change is to be expected, it should be guided by community choices—not forced by colonial policy.

Making change. Some important initial reforms have gained toeholds within the current system, particularly within the Alaska State judiciary. In her 2013 “State of the Judiciary Address,” Chief Justice Dana Fabe of the Alaska Supreme Court praised both the State-deputized circle sentencing program, a traditional Native practice for restoring breaches in the community caused by wrongdoing, which the State has piloted as a sentencing practice in a limited number of State court proceedings, and Tribal courts, which are fully independent of State control:

Tribal courts bring not only local knowledge, cultural sensitivity, and expertise to the table, but also are a valuable resource, experience, and a have a high level of local trust. They exist in at least half the villages of our State and stand ready, willing, and able to take part in local justice delivery. Just as the three branches of State government must work together closely to ensure effective delivery of justice throughout the State court system, State and Tribal courts must work together closely to ensure a system of rural justice delivery that responds to the needs of every village in a manner that is timely, effective, and fair.⁴²

Backing up words with action, Justice Fabe and her colleagues have been instrumental in improving the enforceability of Tribal court orders concerning domestic violence and engaging State and Tribal courts in shared training meetings.

This outreach and innovation by the Alaska judiciary is impressive and welcome, but it falls far short of what is truly needed. More Tribal villages need Tribal courts and sentencing circles, and where such institutions already exist, greater Tribal jurisdiction could make them even more effective.

Native villages without reasonable access to law enforcement should have that access, and all of their law enforcement officers should have the training and approval to carry firearms subject to standards that accord with all State peace officers. Native village residents should be able to participate locally in substance abuse treatment, technology-assisted alternatives to detention, and anger management programs. Not only the

State's judicial branch, but also all of State government should be working in greater collaboration with Alaska Native Tribes. The immediate and overriding need is for a criminal justice system that fully recognizes, respects, and empowers their governments.

What policy adjustments the State of Alaska should make in support of greater Tribal authority over criminal justice is something the State and its citizens should decide, not the Indian Law and Order Commission. The Commission notes only that a variety of organizational models support greater empowerment and that the shift must include the financial means for Tribal governments to do their share. Among others, options include:

- collaborating with Tribes on other criminal justice issues
- deputizing Tribes to provide a wide array of criminal justice services
- delegating or deputizing Tribal judges, including the expanded use of circle sentencing and traditional dispute resolution
- leveraging the State and Tribal governments' concurrent criminal jurisdiction to develop specific, locally optimal criminal justice approaches
- adopting a policy of State deference to Tribal authority in Tribal communities

Questions about how Tribal government services will be paid for immediately draw attention to an important difference between village and urban Alaska communities. Village subsistence economies do not lend themselves to many traditional means of government revenue generation, such as imposing a sales tax. Instead, other forms of finance must be found. Tribal governments may have access to certain Federal income streams (especially if the Commission's recommendations concerning base funding are implemented), and some may have site-specific revenue opportunities, such as in wildlife management, extractable resources, and government contracts.

The State government can also generate funds for Tribal criminal justice programming by rooting out inefficiencies and wasteful spending in its current organization, taking advantage of cost-savings from the increased use of alternatives to detention and other innovations in service provision, and moving money out of regional centers when increases in Tribal capacity make the current extent of service provision unnecessary.⁴⁴

Regional Alaska Native Corporations, the largest beneficiaries from Tribal resources over the last four decades, also should increase their contributions to the governments that justify their existence. The bottom line is that as Alaska Native Tribal governments must have adequate finances to carry out the functions of government, meet their

responsibilities to citizens, and work to improve their citizens' lives. As a legal matter, such changes may require statutory and constitutional change in Alaska, as well as corresponding reforms to ANSCA and other laws.⁴⁵

While acknowledging that change in the criminal justice system that serves Native Alaska is primarily a State and Tribal responsibility, the Indian Law and Order Commission observes that there also is a role for Congress. By making relatively modest changes to law and policy, Congress can help create a jurisdictional framework that supports Tribal sovereignty, provides a clearer role for the State, and lays groundwork for the resolution of resourcing issues.

Because the vast majority of public safety concerns in rural and Native Alaska relate to substance abuse, minimizing harms from alcohol and drug use will be key to addressing public safety issues in Native villages. There must be creative thinking about substance abuse problems and other local public safety concerns, by a broader set of individuals, (especially Tribal governments, but others as well), who can leverage a wider set of resources.

When Tribal governments have a larger decision-making role, it is likely that even more locally based, therapeutic sentencing models will emerge; that treatment resources in Native villages will be more integrated with law enforcement; that criminal justice and social services will be deployed more often for prevention and harm reduction than for intervention and punishment; and that new players, such as nonprofit organizations or Tribal collaboratives, will join in. This is not to minimize the difficulty in solving problems related to transportation, access, and infrastructure, but to suggest that even for very entrenched problems like substance abuse reduction, expanding local Tribal governments' authority offers more hope than does the status quo.

RECOMMENDATIONS

2.1: *Congress should overturn the U.S. Supreme Court's decision in Alaska v. Native Village of Venetie Tribal Government,⁴⁶ by amending ANCSA⁴⁷ to provide that former reservation lands acquired in fee by Alaska Native villages and other lands transferred in fee to Native villages pursuant to ANCSA are Indian country.*

The *Venetie* decision was based on an outdated and static understanding of ANCSA. Although that statute was first enacted under the influence of Termination Policy, it has been amended and reinterpreted many times since then, moving gradually but unmistakably toward a Tribal self-determination model. Thus, although the original language of ANCSA disavowed “lengthy wardship or trusteeship”⁴⁸ for Alaska Natives, later amendments deliberately extended restrictions on transfer of shares in Alaska Native Corporations out of Native ownership, and included other measures to ensure continued Native control of Alaska Native Corporations and the lands they own.⁴⁹

Further, as noted above, in 1993 the executive branch confirmed recognition of Alaska Native villages as federally recognized Indian nations with a government-to-government relationship with the United States. Since then Federal agencies have been providing services to Alaska Native villages that clearly qualify as Indian country much as they do for Tribes on reservation lands. Nothing in ANCSA expressly barred the treatment of these former reservation and other Tribal fee lands as Indian country. As a consequence, the *Venette* decision has been widely criticized for failing “to honor longstanding principles of Indian law favoring the preservation of Tribal rights and powers until Congress clearly expresses its intent to terminate those rights and powers.”⁵⁰ Congress should step forward and correct the Supreme Court’s misguided interpretation of ANCSA.

2.2: Congress and the President should amend the definitions of Indian country to clarify (or affirm) that Native allotments and Native-owned town sites in Alaska are Indian country.

There is an archipelago of lands—individual Indian allotments and commonly held lands within Alaska Native town sites—that ANCSA did not affect. These are geographies over which the Federal government retains a trust responsibility, and they should be fully recognized as Indian country.

These parcels are not insignificant—conservative estimates place their total area somewhere between 4 and 6 million acres.⁵¹ If a land base is what is needed to exercise criminal jurisdiction (and other kinds of land-based jurisdiction), the change would clarify that at least some Alaska Native Tribes do have one. Furthermore, these lands are foothold from which Indian country in Alaska can be expanded.

2.3: Congress should amend the Alaska Native Claims Settlement Act to allow a transfer of lands from Regional Corporations to Tribal governments; to allow transferred lands to be put into trust and included within the definition of Indian country in the Federal criminal code; to allow Alaska Native Tribes to put tribally owned fee simple land similarly into trust; and to channel more resources directly to Alaska Native Tribal governments for the provision of governmental services in those communities.

To assert substantial land-based jurisdiction, Alaska Native Tribes need more land, with a focus on restoring and consolidating Tribal authority within Native villages and town sites. Transfers of Regional Corporation land back to Tribes and conversion of this land to trust status makes that possible. Tribes also should have the option of converting any land held in fee simple to trust status to further enlarge the reach of territorial jurisdiction.

Where Tribes in Alaska pursue such land consolidation and create larger swaths of Indian country in Alaska, the argument for them to opt out of P.L. 85-280 jurisdiction (as provided for in Commission recommendation

1.1) is at least as strong as it is for P.L. 85-280 Tribes in the lower 48. Indeed, Alaska Native Tribes may have a stronger case for exiting State jurisdiction under P.L. 85-280 because the State of Alaska centralizes its jurisdiction much more than other States, allowing even less local control.

Significantly, there are benefits of larger Tribal land bases that extend beyond improved criminal justice. For one, larger land bases help secure economic opportunity, that is, market opportunities that could help fund Tribal government and subsistence activities that provide Tribal citizens with greater food and financial security.

In fact, a larger tribally controlled land base for subsistence may have a variety of positive consequences. It can be protective of the environment, as Alaska Native communities have a vested interest in sustaining ecological health. It can decrease the criminalization of subsistence harvesting by expanding the geography in which community members can harvest without facing a choice between breaking the law and feeding their families. And, it may decrease social distress (which ultimately relates to public safety concerns) by providing productive, self-esteem enhancing “employment” for community members.

Some lawmakers have considered ANCSA sacrosanct, and may object to its amendment. But the Commission notes that ANCSA has been amended many times before with the intention of protecting Alaska Native resources, and the Commission’s proposals share that commitment.⁵² Indeed, from its passage in 1971, ANCSA was amended by nearly every Congress for the next 35 years, so it is hardly set in stone.⁵³

Moreover, while the Commission’s proposals for amendment are relatively modest, its members also observe that ANCSA got Indian policy in Alaska wrong. ANCSA has strong similarities to the General Allotment Act of 1887, which by converting communal land into individual land assets was intended to assist American Indians in adapting to Western life ways. The legislation’s implicit assumption was that after a generation or two, Indigenous peoples would no longer desire Tribal settlement arrangements. But, by the early 1930s, the empirical evidence generated by five decades of allotment invalidated the idea that American Indians would assimilate or that land allotment was the best way forward.

The U.S. government acknowledged its error and repudiated its policy with the Indian Reorganization Act of 1934 (IRA).⁵⁴ While the IRA has been problematic in some ways, it firmly recognized Tribal sovereignty and Tribes’ right to hold lands in common. It also led to reinvestment in American Indian communities with the understanding clarified in P.L. 93-638 that local Tribal governments are best positioned to address the social and economic needs of their citizens. Forty years after the passage of ANCSA, the Commission finds that the United States again has empirical evidence that allotment—albeit in a newer form—does not work. As Congress did with passage of the IRA, it is time to respond to the evidence

As the Federal government feverishly works to ward off a looming cash crunch, Alaska needs to work with Tribes creatively to conserve dwindling resources. The models are already there. The proverbial wheel need not be re-invented. Isn't the goal to solve the problems associated with jurisdiction, not perpetuate them? States like Wisconsin, Maine, and Arizona are to be applauded in their efforts to push through outdated prejudices and fears to create cooperative, problem-solving protocols. In some States, a simple cup of coffee between historic adversaries grew into powerful partnerships. We stand on fertile ground to develop both responsible and effective tools to reduce the domestic violence epidemic in Alaska and enter a new age of mutual understanding and cooperation.

*Myron Naneng, Sr., President of the Association of Village Council Presidents
Alaska Dispatch
March 17, 2013*

Overarching Themes of the 2006 Alaska Rural Justice and Law Enforcement Commission Report

1. Engage in more partnering and collaboration, especially through cross-jurisdictional agreements
2. Make systemic changes to improve rural law enforcement, especially changes that would support the training and certification of more Tribal officers
3. Enlarge the use of community-based solutions, especially through the delegation of authority to Tribes to address juvenile matters
4. Broaden the use of prevention approaches, with a special concentration on cultural relevance
5. Broaden the use of therapeutic approaches, including linking these approaches to culturally appropriate child welfare services
6. Increase employment of rural residents in law enforcement and judicial services by recruiting rural and Alaska Natives, creating opportunities for in-community probation supervision, and contracting with tribes for community service
7. Build additional capacity through infrastructure investments in housing for public safety officers, holding facilities in rural Alaska, and improve equipment
8. Increase access to judicial services, especially through increased jurisdiction and funding for Tribal courts
9. Expand the use of new technologies, especially by learning from the implementation of tele-medicine

that Alaska Native nations are not going away and reaffirm the status of Alaska Native Tribal governments as the key players in improving the lives of Alaska Natives. The recommended amendments to ANCSA for the return of land assets and for financial support of Tribal governments are based on this understanding.

2.4: Congress should repeal Section 910 of Title IX of the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments), and thereby permit Alaska Native communities and their courts to address domestic violence and sexual assault, committed by Tribal members and non-Natives, the same as now will be done in the lower 48.

The special rule applying Title IX of the VAWA Amendments to only one Native community in Alaska is inimical to providing effective public safety in Alaska. A simple fix is the removal of the one section relating to Alaska, which puts Alaska Native communities on par with Native communities throughout the nation. Allowing Tribal courts to issue protective orders, to enforce them, and provide the local, immediate deterrence effect of these judicial actions may be the single-most effective tool in fighting domestic violence and sexual assault in Native communities in Alaska. Significantly, many of the VAWA Amendments provisions apply even in the absence of Indian country and clearly should be in the purview of Tribal courts in Alaska.⁵⁵

2.5: Congress should affirm the inherent criminal jurisdiction of Alaska Native Tribal governments over their members within the external boundaries of their villages.

P.L. 83-280 does not fit well in Alaska, predicated as it was on the presence of Indian country as defined by the Federal criminal code. The changes wrought by ANCSA effectively diminished any real meaning for P.L. 83-280 in Alaska, yet it is the law that the State relies on to hold that Alaska Native Tribes cannot exercise concurrent criminal law jurisdiction over their own members, frustrating the development of local-level criminal justice institutions. Regardless of what lands Tribes own or whether they are considered Indian country, this recommendation offers an opportunity to use new tools to respond to the public safety crisis in Alaska Native communities.

These changes authorize Tribes to locally and immediately attend to violence and criminal activity. They make it easier to create State-Tribal MOUs for law enforcement deputization and cross-deputization, cooperate in prosecution and sentencing, and apply criminal justice resources for optimal, mutual benefit. Such reforms also facilitate the ability of Alaska Native Tribes and nations to work together for mutual benefit, such as creating intertribal courts and institutions. Of course, to make the most of this Federal affirmation, Tribes should take action to clarify and, as necessary, formalize Tribal law for governing their recognized territories, especially law that relates to public safety.

CONCLUSION

In the words of Chief Justice Fabe:

Every study or survey of rural justice over the past two decades has acknowledged the unique and compelling justice needs of Alaska’s small and isolated villages. The Alaska Sentencing Commission, the Alaska Natives Commission, the Alaska Judicial Council, the Alaska Supreme Court’s Advisory Committee on Fairness and Access, the Alaska Commission on Rural Governance and Empowerment, and the Alaska Rural Justice and Law Enforcement Commission, have each studied the issues thoroughly. Consistent among their recommendations is a theme heard with increasing urgency: the need for greater opportunities for local community leaders and organizations to engage in justice delivery at the local level. Quite simply, for courts to effectively serve the needs of rural residents, justice cannot be something delivered in a far-off court by strangers, but something in which local people—those most intimately affected—can be directly and meaningfully involved.⁵⁶

The Chief Justice’s framing of the systemic dysfunction that flows from the State’s existing justice system may give reason for hope. Yet hope is not a strategy.

The Indian Law and Order Commission is not the first advisory board to recognize the lack of access to safety and public safety services in Alaska Native communities. But it should be the last. The situation in Alaska is urgent and of national, and not just State or regional, importance. Only the combined efforts of Federal, State, and Tribal leaders will be sufficient to change course and put all Alaskans on a better path.

ENDNOTES

¹ The statistic includes those who reported American Indian and Alaska Native alone or in combination with other races. Data are available in *Demographic Profile for Alaska, 2010* U.S. Census, accessed February 28, 2013, <http://live.laborstats.alaska.gov/cen/dp.cfm>

² *Alaska*, accessed September 6, 2013, <http://en.wikipedia.org/wiki/Alaska>

³ *List of U.S. States by Population Density*, accessed September 6, 2013, http://en.wikipedia.org/wiki/List_of_U.S._states_by_population_density

⁴ Alaska Federation of Natives, *Alaska Day 2012, Renewable Energy Solutions for Rural Alaska: Alaska Energy Brief*, May 2012, 4, accessed September 6, 2013, <http://www.nativefederation.org/wp-content/uploads/2012/10/2012-afn-cap-alaska-day-brief.pdf>

⁵ Estimates calculated from data on the webpage “Demographic and Geographic Sketches of Alaska Natives,” Alaska Natives Commission, accessed September 6, 2013, <http://www.alaskool.org/resources/anc/anc07.htm>

⁶ For a description of Alaska’s unique corporation model as created by the Alaska Native Claims Settlement Act of 1971, see DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* (2012)

⁷ *About VPSO Program*, Alaska Department of Public Safety, accessed February 22, 2013, <http://dps.alaska.gov/ast/vpso/about.aspx>

⁸ Together, the U.S. Federal government and Alaska and Alaska Native Regional and Village Corporations own 266 million rural acres in Alaska. A more expansive estimate of Alaska rural acreage—371 million acres—is based on developed and developable land in the state. The numerator in each estimate is 373 officers ADPS officers. For land figures, see *Fact Sheet, Title: Land Ownership in Alaska*, Alaska Department of Natural Resources, accessed February 23, 2013, http://dnr.alaska.gov/mlw/factsht/land_own.pdf; for ADPS employment statistics see Jennifer Hoage, *Crime Reported in Alaska 2011: Uniform Crime Reporting Program*, Alaska Department of Public Safety, 24, accessed February 14, 2013, http://dps.alaska.gov/statewide/docs/UCR/UCR_2011.pdf

⁹ *About VPSO Program*, *supra* note 7.

¹⁰ *Legislative Hearing on S. 1192, Alaska Safe Families and Villages Act of 2011, and S. 1763 Stand Against Violence and Empower Native Women Act Before S. Comm. on Indian Affairs*, 112th Cong. 54 (Written Testimony of Joseph Masters, Commissioner, Alaska Department of Public Safety) (2013), available at <http://www.indian.senate.gov/hearings/loader.cfm?cs-Module=security/getfile&pageid=9515>; *Frequently Asked Questions, Village Public Safety Officer Program*, Alaska Department of Public Safety, accessed February 28, 2013, <http://dps.alaska.gov/ast/vpso/faq.aspx>; and Dave Bendigner, *VPSO Thomas Madole Killed In Manokotak*, ALASKA PUBLIC MEDIA, March 20, 2013, accessed March 21, 2013, <http://www.alaska-public.org/2013/03/20/vpso-thomas-madole-killed-in-manokotak/>

¹¹ Masters, *supra* note 10; Alaska Natives and Law Enforcement (gateway page and publication list), Justice Center, University of Alaska at Anchorage, http://justice.uaa.alaska.edu/directory/l/law_enf_local.html.

¹² Masters, *supra* note 10.

¹³ Alaska Natives and the Courts (gateway page and publication list), Justice Center, University of Alaska at Anchorage, http://justice.uaa.alaska.edu/directory/a/alaska_natives_courts.html; ALASKA COURT SYSTEM, ANNUAL REPORT FY 2012, <http://courts.alaska.gov/reports/annualrep-fy12.pdf> (describing the structure of the Alaskan court system and discussing some of the problems with providing services in rural communities).

¹⁴ ALASKA LEGAL SERVICES CORPORATION, 2012 ALASKA TRIBAL COURT DIRECTORY i, <http://alaskatribes.org/uploads/2012-tc-directory.pdf>.

¹⁵ “Alaska Natives and the Courts (gateway page and publication list), Justice Center, University of Alaska at Anchorage, http://justice.uaa.alaska.edu/directory/a/alaska_natives_courts.

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¹⁶ Cheryl Cedar Face, *Emmonak Women's Shelter Receives Emergency Funds*, AMERICAN INDIAN REPORT, July 6, 2012, <http://www.americanindianreport.com/wordpress/2012/07/emmonak-womens-shelter-receives-emergency-funds/>.

¹⁷ Timothy Williams, *With Grant, an Alaska Women's Shelter Can Reopen*, N.Y. TIMES, July 5, 2012, http://www.nytimes.com/2012/07/06/us/alaskan-womens-shelter-can-reopen-with-grant.html?_r=0.

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¹⁹ Alaska Drug Treatment Centers, National Substance Abuse Index, <http://nationalsubstanceabuseindex.org/alaska/facilities.php> (listing facilities); and Mental Health Treatment Facility Locator, Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services," <http://findtreatment.samhsa.gov/MHTreatmentLocator/faces/stateSearch.jspx> (listing facilities).

²⁰ Marny Rivera, André B. Rosay, Darryl S. Wood, Greg Postle, & Katherine TePas, *Descriptive Analysis of Assaults in Domestic Violence Incidents Reported to Alaska State Troopers: 2004 at 7*, Justice Center, University of Alaska at Anchorage, JC 0601.04 (2008) <http://justice.uaa.alaska.edu/research/2000/0601intimatepartnerviolence/0601.04.dv-assaults.pdf>.

²¹ For victimization statistics, see Greg Postle, André B. Rosay, Darryl S. Wood, & Katherine TePas, *Descriptive Analysis of Sexual Assault Incidents Reported to Alaska State Troopers: 2003-2004*, Justice Center, University of Alaska at Anchorage at 41-42 (2007), <http://justice.uaa.alaska.edu/research/2000/0601intimatepartnerviolence/0601.02.sexualassault.pdf>; for population statistics (used to calculate victimization rates) see 2005 ANNUAL REPORT and 2004 ANNUAL REPORT, ALASKA BUREAU OF VITAL STATISTICS, http://dhss.alaska.gov/dph/VitalStats/Documents/PDFs/2005/annual_report/Web_Book2005.pdf and http://dhss.alaska.gov/dph/VitalStats/Documents/PDFs/2004/annual_report/2004web_book.pdf

²² Darryl S. Wood & Randy H. Magen, *Intimate Partner Violence Against Athabaskan Women Residing in Interior Alaska: Results of a Victimization Survey*, 15 Violence Against Women 497, <http://justice.uaa.alaska.edu/research/2000/0026.aknativewomen/0026.02.ahtna.pdf>

²³ Kyla Hagan & Ellen Provost, *Alaska Native Health Status Report*, Alaska Native Epidemiology Center and Alaska Native Tribal Health Consortium, at 38 (2009), <http://www.anthc.org/chs/epicenter/upload/ANHSR.pdf>

²⁴ STATE OF ALASKA, 2011 CENSUS DEMOGRAPHIC PROFILE, <http://labor.alaska.gov/research> and STATE OF ALASKA DEPARTMENT OF CORRECTIONS, 2011 OFFENDER PROFILE, [13http://www.correct.state.ak.us/admin/docs/2011Profile06.pdf](http://www.correct.state.ak.us/admin/docs/2011Profile06.pdf)

²⁵ STATE OF ALASKA DEPARTMENT OF CORRECTIONS, 2011 id. at 32.

²⁶ Michael J. Leiber, Joseph Johnson, & Kristan Fox, *An Examination of the Factors that Influence Justice Decision Making in Anchorage and Fairbanks, Alaska: An Assessment Study*, Technical Report prepared for the State of Alaska Department of Health and Social Services, Division of Juvenile Justice (2006), 31-32, <http://dhss.alaska.gov/djj/Documents/ReportsAndPublications/DMC/06AssessmentStudy.pdf>

²⁷ Centers for Disease Control and Prevention, National Center for Injury Prevention and

Control, Web-based Injury Statistics Query and Reporting System (WISQARS) [online], 2004-2008 Alaska Suicide Injury Deaths and Rates per 100,000, accessed March 4, 2013; Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Web-based Injury Statistics Query and Reporting System (WISQARS) [online], 2004-2008 United States Suicide Injury Deaths and Rates per 100,000, accessed March 4, 2013; and Gretchen Day, Peter Holck, & Ellen M. Provost, *Alaska Native Mortality Update: 2004-2008*, ALASKA NATIVE EPIDEMIOLOGY CENTER (2011) at 4, http://www.anthctoday.org/epicenter/publications/mortality/AlaskaNativeMortalityUpdate2004_2008_17_jan_2012.pdf

²⁸ Alaska Department of Health and Social Services, Office of Children's Services, *Data Overview of Disproportionality in Alaska's Child Welfare System* (2012) <http://dhss.alaska.gov/ocs/Documents/icwa/pdf/Disproportionality-data.pdf>.

²⁹ Alaska Rural Justice and Law Enforcement Commission, *Initial Report and Recommendations* (2006) http://akjusticecommission.org/pdf/reports/ARJLEC_Initial_Report_Recommendations.pdf

³⁰ Gretchen Day, Peter Holck, & Ellen Provost, *supra* note 27 at 15, 265.

³¹ For example, in dry villages with law enforcement, there is a 40 percent lower rate of serious injury caused by an assault as compared to dry villages without a law enforcement presence. Darryl S. Wood & Paul J. Gruenewald, *Local Alcohol Prohibition, Police Presence and Serious Injury in Isolated Alaska Native Villages*, 101 ADDICTION 393 (2006).

³² 522 U.S. 520 (1998).

³³ While these statements are true, the Commission finds the Alaska Attorney General's argument to be inconsistent. The assertion of P.L. 85-280 jurisdiction is unnecessary if there is no Indian country in Alaska.

³⁴ *Akiachak Native Community v. Salazar*, Civ. 06-969 (RC), 2013 WL 1292172 (D.D.C. 2013).

³⁵ See *M.J. ex rel. Beebe v. United States*, 721 F.3d 1079 (9th Cir. 2015).

³⁶ David Joulfaian and Michael L. Marlow, *Centralization and Government Competition*, 23 Applied Econ. 1603 (1991).

³⁷ HARV. PROJECT ON AM. INDIAN ECON. DEVEL., *THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* (2008).

³⁸ See UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, especially sections 4 and 5, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf on February 28, 2013.

³⁹ Governmental Jurisdiction of Alaska Native Villages Over Land and Non-Members, Memorandum to the Secretary from the Solicitor, Department of the Interior (Thomas Sansonetti) (1995), <http://www.doi.gov/solicitor/opinions/M-56975.pdf> on February 28, 2013. The Opinion concluded that there were tribes in Alaska, but that their territorial jurisdiction had been limited by the by passage of the Alaska Native Claims Settlement Act.

⁴⁰ 982 P.2d 738 (Alaska 1999)

⁴¹ LISA JAEGER, TRIBAL COURT DEVELOPMENT: ALASKA TRIBES (3rd ed. 2002) at *Chapter 2: Tribal Jurisdiction Exercise by Alaska Tribal Courts*, http://thorpe.ou.edu/AKtribalct/chapter_two.html.

⁴² Dana Fabe, *The State of the Judiciary: A Message by Chief Justice Dana Fabe to the First Session of the Twenty-Eighth Alaskan Legislature* (Feb. 13, 2013) at 13, <http://courts.alaska.gov/soj/state13.pdf> on March 3, 2013. The Commission wishes to acknowledge the cooperation of Chief Justice Fabe and the Alaska State Judiciary during Commission field hearings and site visits including her meeting with Commissioners at the State Supreme Court in Anchorage.

⁴⁵ HARV. PROJECT ON AM. INDIAN ECON. DEVEL., *Honoring Contributions in the Governance of American Indian Nations, Kake Circle Peacemaking*, (2005), <http://www.hpaied.org/images/resources/publibrary/Kake%20Circle%20Peacemaking.pdf>; U.S. Dept. of Just., Natl. Inst.

of Just., “Sentencing Circles,” <http://www.nij.gov/topics/courts/restorative-justice/promising-practices/sentencing-circles.htm> (quotations); NEIL NESHEIM, *EVALUATING RESTORATIVE JUSTICE IN ALASKA: THE KAKE CIRCLE* (2010), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/famct/id/293> (statistics).

⁴⁴ Experience with system reform in the lower 48 suggest that these cost savings are achievable. See, for example, ANNIE E. CASEY FOUNDATION, *FIXING A BROKEN SYSTEM: TRANSFORMING MAINE’S CHILD WELFARE SYSTEM* 8 (2009) (describing the cost savings from structural reform) http://www.aecf.org/~media/Pubs/Topics/Child%20Welfare%20Permanence/Other/FixingABrokenSystemTransformingMainesChildWel/AECF_FixingABrokenSystemFinal_Final.pdf;

⁴⁵ A complete analysis of these options is essential to lay the groundwork for a more cost-effective, tribally based criminal justice system that places greater emphasis on the power of local control and accountability. This includes such basic issues as ensuring that Tribal villages can swiftly enforce their own laws related to alcohol, domestic violence, and other pervasive challenges whose implications are predominately local in nature, as is common place in the lower 48. A worthwhile place to begin would be to extend the very general framework from enhanced Alaska Native tribal sovereignty articulated in DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* (2012), especially Chapter 10 (“Sovereignty”). While Case and Voluck do not examine criminal justice issues per se, their insights on the interplay among State, tribal, and Federal laws are instructive.

⁴⁶ 522 U.S. 520 (1998).

⁴⁷ 43 U.S.C. § 1601.

⁴⁸ 43 U.S.C. § 1601(b).

⁴⁹ See NELL JESSUP NEWTON ET AL., *COHEN’S HANDBOOK OF FEDERAL INDIAN LAW* § 4.07[3][b][ii][C] (2012 ed.).

⁵⁰ *Id.* at 355.

⁵¹ Natalie Landreth and Erin Dougherty, *The Use of the Alaskan Native Claims Settlement Act to Justify Disparate Treatment of Alaska’s Tribes*, 36 AM. INDIAN L. REV. 321, 345-46 (2012).

⁵² J. Tate London, *The ‘1991 Amendments’ to the Alaska Native Claims Settlement Act: Protection for Native Lands*, 8 STAN. ENVTL. L.J. 200 (1989).

⁵³ Case and Voluck, *supra* note 46 at 165.

⁵⁴ 48 Stat. 984 (1934), also known as the Wheeler-Howard Act or “Indian New Deal.”

⁵⁵ Sen. Mark Begich (D-AK) introduced a bill entitled “Alaska Safe Families and Villages Act of 2013” (S. 1474) on August 1, 2013, which was intended as a “fix” to the special Alaska exclusion in the Violence Against Women Act Reauthorization of 2013. However, the version Begich introduced fell far short of the version that many Alaska Native advocates had been expecting. Earlier draft language had proposed to supplement State jurisdiction in Alaska Native villages with enhanced Tribal and local authority to address domestic violence and reduce alcohol and drug abuse. The final bill was about the Tribes entering into agreements to implement State law, which advocates claim they do not need Federal legislation to do. *Native Sun News* reported that “Begich’s aide Andrea Sanders said the changes came about through consultations between both Alaska senators and the state’s Attorney General Michael C. Geraghty on July 31.” At the time of writing (fall 2013), S. 1474 had stalled in committee, but this outcome further underscores the importance of finally standing up for Alaska Natives’ rights, as implementation of the Commission’s recommendations would do. See Talli Nauman, *Violence Against Women Act Amendment Falls Short of Protecting Women*, NATIVE SUN NEWS, August 12, 2013, <http://www.indianz.com/News/2013/010769.asp> (reprint), and “S.1474: Alaska Safe Families and Villages Act of 2013,” <http://www.govtrack.us/congress/bills/113/s1474/text>.

⁵⁶ Fabe, *supra* note 42 at 8. These are the citations for the reports mentioned in the address: (1) Alaska Sentencing Commission, *1992 Annual Report to the Governor and the Alaska*

Legislature, <http://www.ajc.state.ak.us/reports/sent92.pdf>; (2) Alaska Natives Commission, *Final Report* (1994) http://www.alaskool.org/resources/anc_reports.htm; (3) Alaska Judicial Council, *Resolving Disputes Locally: Alternatives for Rural Alaska* (1992) <http://www.ajc.state.ak.us/reports/rurj92.pdf>; (4) Alaska Supreme Court Advisory Committee on Fairness and Access & State Justice Institute & State Justice Institute, *Report* (1997) <http://www.ajc.state.ak.us/Reports/fairness.pdf>; (5) Alaska Commission on Rural Governance and Empowerment, *Final Report to the Governor* (1999) http://www.commerce.state.ak.us/dca/RGC/RGC_Final_6_99.pdf; (6) Alaska Rural Justice and Law Enforcement Commission, *Initial Report and Recommendations* (2006) http://akjusticecommission.org/pdf/reports/ARJLEC_Initial_Report_Recommendations.pdf; (7) Alaska Rural Justice and Law Enforcement Commission, *Report to the United States Congress and the Alaska State Legislature* (2012) http://akjusticecommission.org/pdf/reports/ARJLEC_2012_Report.pdf; (8) Alaska Supreme Court Fairness and Access Implementation Committee, *2007 Status Report of the Alaska Supreme Court Fairness and Access Implementation Committee* (2007), <http://courts.alaska.gov/fair-access2007.pdf>. A report that is not mentioned, but makes similar points is: Alaska Advisory Committee to the U.S. Commission on Civil Rights, *Racism's Frontier: The Untold Story of Discrimination and Division in Alaska* (2002), <http://www.eric.ed.gov/PDFS/ED468859.pdf>.



STRENGTHENING TRIBAL JUSTICE: LAW ENFORCEMENT, PROSECUTION, AND COURTS

Many Tribal justice systems are undergoing unprecedented change as Native nations consider extending their inherent criminal jurisdiction over non-Indians in domestic violence cases as provided by the Violence Against Women Act Reauthorization Act of 2013 (VAWA Amendments), and as they implement the advanced sentencing options for Indians provided by the Tribal Law and Order Act of 2010 (TLOA). The jurisdictional reforms that the Indian Law and Order Commission recommends (Chapter 1)—up to and including the ability of Indian nations to exit the Federal criminal justice system, except for Federal laws of general application and to retrocede from State criminal jurisdiction in P.L. 83-280 States—will present ever greater opportunities for strengthening locally accountable, tribally based criminal justice systems.

The Commission proposes specific reforms in three areas: law enforcement, prosecution and legal services, and increased cooperation with the Federal judiciary. When these reforms are implemented with the jurisdictional, juvenile justice, and other proposals detailed in this report, Tribal justice systems can close the public safety gap between Indian country and the rest of the United States. An examination of the technical issues related to Federal funding in Indian country, including grant programs, results in recommendations to speed these resources to the Tribal nations that need them with less delay and bureaucratic red tape.

FINDINGS AND CONCLUSIONS: POLICE POWER AND DATA STRENGTHEN TRIBAL LAW ENFORCEMENT

What works: boots on the ground. A foundational premise of this report is that Indian Tribes and nations throughout our country would benefit enormously if locally based and accountable law enforcement officers were staffed at force levels comparable to similarly situated communities off-reservation. There is strong empirical support for this common-sense assumption.

For approximately 24 months spanning 2009-2011, the Office of Justice Services (OJS) in the Bureau of Indian Affairs (BIA) increased staffing levels on four Indian reservations to achieve such parity:

- The Wind River Indian Reservation of Wyoming, home to the Eastern Cheyenne and Northern Arapaho Tribes
- The Rocky Boy's Chippewa-Cree Reservation in Montana
- The Mescalero Apache Reservation in New Mexico
- The Standing Rock Sioux Reservation in South Dakota

BIA's "High Priority Performance Goal (HPPG)" Initiative¹ was intended to raise law enforcement staffing levels on those four reservations to a level commensurate with comparable off-reservation communities. In addition to raising force levels, by supporting crime prevention and deterrence, rather than relying on crisis and emergency response, the HPPG Initiative took more assertive steps to reduce disproportionately high crime rates on all four reservations.

This strategy included data-driven intervention planning, crime tracking, and ongoing evaluation of officer deployment. In other words, HPPG concentrated on raising force levels to parity and shifting those officers' emphasis to more proactive missions. Importantly, however, HPPG had self-designed limitations. Perhaps most significantly, only law enforcement levels were increased. Due to budget restrictions and divided authority between OJS (part of the U.S. Department of the Interior) and the U.S. Department of Justice (DOJ), staffing for other components of these Tribal justice systems, including prosecution and judicial staff, were not increased.

At the outset of HPPG, OJS and its director, Darren Cruzan, had a modest goal for this initiative: to reduce crime on each of these reservations by 5 percent. Yet despite its limitations, the HPPG Initiative's results more than exceeded expectations. On average, violent crime rates across the four reservations in the HPPG Initiative fell 35 percent over 2 years—by 68 percent at Mescalero alone.² In each case, crime rates initially

went up, as local citizens, responding to a more visible and active law enforcement presence, gained the confidence to report more crimes, and then declined nearly across the board.

Reminiscent of “hotspot policing,” an approach that has been effective in America’s urban areas, the simple premises behind HPPG—parity in force levels, coupled with more emphasis on crime prevention and deterrence, attests to what can happen when Tribal authorities have the comparable resources needed to do the job.⁵ As one HPPG participant noted, “We knew from the very beginning that the numbers [would be] the key to being successful. You’ve got to get people on the ground to start making a difference.”⁴

Federal resource constraints. While the HPPG Initiative demonstrates what can work in Indian country, the Commission hastens to note that HPPG’s results can neither be replicated nor sustained on very many other Tribal reservations due to the extremely limited Federal and State funding options currently available to Indian country.

Even in the midst of HPPG, OJS provided congressionally appropriated funds to just 3,268 total law enforcement positions in all of Indian country. Of that total, FY 2010 data show 434 positions within OJS itself, the majority of them not sworn peace officer positions, and 2,834 positions with Tribal law enforcement agencies. The latter may receive funding not only from OJS, through agreements under P.L. 93-638, but also from DOJ through Community Oriented Policing Services (COPS) grants, and/or directly from their Tribal governments. Of the remaining OJS employees, those who are sworn as peace officers are expected to provide services to 191 separate law enforcement programs (40 BIA-operated and 151 tribally operated) and police a staggering 56 million acres of Indian lands.⁵ This staffing level is obviously much too low to pursue effective strategies such as HPPG in very many places, let alone across the board. In fact, to avoid reducing law enforcement coverage elsewhere in Indian country, BIA had to borrow officers from other law enforcement services within the U.S. Department of the Interior (the National Park Service and U.S. Fish and Wildlife Service, for example) just to implement HPPG.

Despite the current budget reality, the Commission believes it is absolutely imperative that the results of the HPPG Initiative not be forgotten. The findings are real, the results validated, and the lessons clear: Parity in law enforcement services prevents crime and reduces violent crime rates. At a minimum, Congress should seriously consider projecting the results of HPPG to the other 566 federally recognized Indian Tribes to establish a base-level funding level for boots-on-the-ground law enforcement staffing levels and services.

Even if those funding levels cannot be achieved in the near term, increases might nonetheless be phased in over time until actual parity is achieved. Nor, of course, should law enforcement be the only

“Despite the current budget reality, the Commission believes it is absolutely imperative that the results of the HPPG Initiative not be forgotten. The findings are real, the results validated, and the lessons clear: Parity in law enforcement services prevents crime and reduces violent crime rates.”

consideration; the rest of the criminal justice system, along with social service departments and other wrap-around service providers, must also be considered for funding enhancements. Preventing violent crime not only saves lives, but, as economists the world over can attest, also can greatly reduce economic loss.

As congressional appropriators consider how parity-based criminal justice resources might reduce both direct and indirect costs to Federal and State justice systems, and as Tribal governments take on more fiscal responsibility and authority for keeping law and order on their reservations, lawmakers should also take into account just how serious the current disparities between Indian country and the rest of the United States have become:

- For FY 2010, OJS staffing levels for sworn personnel providing direct services within the six OJS Districts were estimated at approximately 1.08 officers per 1,000 residents.
- Using the Indian Tribes' current sworn personnel staffing levels, Tribal law enforcement were estimated in FY 2010 at approximately 2.16 officers per 1,000 residents.
- Combining the current funded OJS and Tribal law enforcement forces, the total ratio for Indian country law enforcement (OJS and Tribal), based upon their reported service populations, was approximately 1.91 officers per 1,000 residents in FY 2010. Thus, all of these staffing ratios are below the comparable national average of 3.5 officers per 1,000 residents.⁶

In fact, when funded but unfilled positions are counted in the mix, Indian country data in 2010 show a need for at least 2,991 additional law enforcement officers—a 50 percent staffing shortfall.⁷

Since 2010, these staff shortages have not been addressed in any substantial, across-the-board fashion. The U.S. Department of the Interior (DOI) has asked for and received incremental increases to its Indian country law enforcement budget. DOJ funding available through the COPS program actually has fallen.⁸ The deficits remain; the vast majority of law enforcement and public safety departments in Indian country do not have the coverage capacity and flexibility they need to implement the strategies they know will work to fight crime.

State and local law enforcement. The forgoing discussion applies primarily to Tribes whose land remains under Federal criminal jurisdiction—yet a Tribe's ability to implement what works in Indian country law enforcement is even more constrained if it is subject to P.L. 83-280⁹ or to the dictates of a particular congressional settlement act.¹⁰ In these cases, Congress has transferred Federal criminal jurisdiction on Indian lands to State governments and approved the enforcement of a State's criminal code, by State and local law enforcement officers.

What we do see is an absence of law enforcement on Tribal property. There's not law enforcement for two reasons. One is geographical area. It's a remote area, at least in our county. The other is lack of resources. Now, I know our Tribes have reached out to the Federal government for resources, looked out to the State. California is a P.L. 280 State; we have the responsibility of enforcing criminal laws. But when rural counties lack the resource to even have effective law enforcement in their urban population, it's virtually impossible to have law enforcement in our rural areas, including Tribal areas. The Tribes have looked to develop their own Tribal law enforcement agency. But you have the same issues that the State faces, the lack of resources...at the end of the day, without resources to have staff, you're going to continue to have an absence of law enforcement in Tribal areas.

*Paul Gallegos, District Attorney, Humboldt County, CA
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation, CA
February 16, 2012*

And we lack manpower, we lack equipment, and we lack other resources right down through the level ... to assist with victim witness advocates, Tribal courts. So it's like working with strings and tin cans at times. And if it weren't for some of the grants that we have to go out and try to be awarded from year to year, to be honest with you, I probably wouldn't have even cruisers to operate for the patrol officers....I look at the grant process as another piece that to me it's almost who can beg the loudest and who can paint the picture of the worst of the worst. And I think that's a shame. Because, again, I think the government is stepping away from their responsibility to provide the resources we need.

*Robert Bryant, Chief of Police, Penobscot Nation
Testimony before the Indian Law and Order Commission, Hearing in Nashville, TN
July 13, 2012*

The Commission has addressed many of the significant problems with P.L. 83-280 and other conferrals of State jurisdiction (Chapter 1). The point here is more specific and targeted. As a consequence of P.L. 83-280 and the settlement acts, Federal investment in Tribal justice systems has been even more limited than elsewhere in Indian country. Nor is much help forthcoming from State governments; they have found it difficult to satisfy the demands of what is essentially an unfunded Federal mandate.

For example, while P.L. 83-280 “did not eliminate or limit Tribal criminal jurisdiction, the Department of the Interior often used it as justification for denying funding support to Tribes in the affected States for law enforcement and criminal justice.”¹¹ As recently as September 2013, the U.S. Court of Appeals for the Ninth Circuit denied a Tribe in California (a mandatory P.L. 83-280 State) access to OJS law enforcement funds via a P.L. 93-638 contract,¹² noting: “We have serious doubts that the funding of law enforcement on the Los Coyotes Reservation is adequate, but that problem is unfortunately not unique to this Tribe.”¹³ Consequently, the majority of Tribes in the P. L. 83-280 States and the “settlement Tribes” continue to be denied eligibility for Federal grants or direct contract funds to finance their own police forces (which non-P. L. 83-280 Tribes regularly seek and obtain).

Although the six States in which the stipulations of P.L. 83-280 were mandatory were presumed capable of fulfilling new administrative commitments, the States “often did not have funding to provide for public safety.”¹⁴ “Suddenly required to hire more police, more judges, more prison guards, more probation and parole officers...and to build new police stations, courthouses, and jails, [States] tottered under their new financial obligations.”¹⁵

The results were immediate and posed significant challenges to maintaining law and order on the ground in Tribal communities. In Nebraska, for example, the State government faced such financial hardship that the “Omaha and Winnebago reservations [were] left without any law enforcement once federal officers withdrew.”¹⁶ Even today, 60 years after the passage of P.L. 83-280, the Commission heard testimony about these gaps in law enforcement. Particularly in remote, rural areas, calls for service go unanswered, victims are left unattended, criminals are undeterred, and Tribal governments are left stranded with high-crime environments that they must somehow manage on their own. To the extent that States and localities do provide law enforcement, witnesses testified that there is deep distrust between local non-Indian law enforcement and these Tribal communities, which is evidenced by frequent conflicts, communication failures, and disrespectful actions.

As the Commission has noted elsewhere, a more locally based Tribal police force, accountable and accessible to the communities they serve, could do better. In fact, examples drawn from P.L. 83-280 settings show that they do: resources matter. Tribes that have been able to raise

government revenue from Tribal gaming or other economic activities and have invested in creating a Tribal police force realize overall public safety improvements. Tribal police are able to provide rapid response. They are able to arrest Indians and either detain or arrest non-Indian suspects. The mere presence of Tribal police, visible on the reservation or rancheria, especially when able to patrol the Tribal lands, has an undeniable deterrent effect. Critically, they are an agency that the Tribal community can trust.

Data deficits. OJS’s handbook of lessons learned and “how-to’s” for HPPG stresses the importance of both quantitative and qualitative data to the initiative. Perhaps because the pilot HPPG Initiative had a dedicated crime statistics expert, each of the sites was able generate monthly data on a variety of violent crimes. At least to some extent, they were able to track crimes by location and time of day. That may sound unremarkable, but given the spotty or non-existent statistical information available to understand and address Indian country crime, such data compilation and interpretation was nothing short of remarkable to the Tribes that participated in the HPPG Initiative.

The departments participating in the HPPG pilot initiative were trained in Uniform Crime Reporting (UCR) methods, able to collect and share activity data among shifts, and even designed several site-specific data collection tools. They also had access to peer group information, which allowed them to compare progress across the HPPG participant group and to develop realistic goals. Having local and comparative data has been an important aspect of all similar (and similarly successful) problem-oriented policing approaches outside Indian country as well.¹⁷

Most Tribal police departments do not have these advantages. In fact, the systems for generating crime and law enforcement relevant data about Indian country either are nascent or undeveloped. The Federal Bureau of Investigation (FBI) did not consistently train Tribal law enforcement agencies in UCR methods until 2009, after several U.S. Attorneys vocally complained that even the annual FBI Crime in America reports lacked such basic information. In recent years, personnel in a number of Tribal departments have been trained; but, nothing close to a comprehensive, longitudinal dataset is available for Indian country.

The National Crime Victimization Survey did not sample on Tribal lands until 1999, and even now, victimization data are not reported by reservation or for Indian country as a whole. Many Tribes lack electronic systems that could ease crime data collection and reporting. And, there is still no system that collects and aggregates data from Tribal, State, and Federal authorities concerning crimes committed on Indian lands, an omission that is particularly crippling for P.L. 83-280 Tribes. In fact, it is unclear whether some of the systems used for crime reporting, particularly at the State level, could support the necessary disaggregation.

To plan and assess their law enforcement and other justice activities, Tribes also need other kinds of data. In particular, they need information about:

- the progress in UCR implementation across Indian country
- DOJ's efforts, via the FBI and U.S. Attorney's Offices, to either investigate and prosecute crime or return cases to the Tribal government for action
- technical assistance and training provided and "what works"

Information about these and other markers of the Federal government's efforts to partner with Indian country in fighting crime and promoting justice are essential.

All of these data are vital to Tribes as they seek to increase the effectiveness of their law enforcement and justice systems. Significantly, providing much of this aggregate, national-level data is addressed in TLOA, and the Federal government has begun to produce it. (Appendix G contains a list of reports required by TLOA.) For example, for the first time, Tribes have data about the number of and reasons for U.S. Attorneys' case declinations and the efforts DOJ is undertaking to improve data collection across Indian country. But Tribes also need assurance that they will have this planning and policy-critical information on an ongoing basis or else their own efforts at crime control will be less effective.

RECOMMENDATIONS

3.1: Congress and the executive branch should direct sufficient funds to Indian country law enforcement to bring Indian country's coverage numbers into parity with the rest of the United States. Funding should be made equally available to a) Tribes whose lands are under Federal criminal jurisdiction and those whose lands are under State jurisdiction through P.L. 83-280 or other congressional authorization; b) Tribes that contract or compact under P.L. 93-638 and its amendments or not; and c) Tribes that do or do not opt out (in full or in part) from Federal or State criminal jurisdiction as provided in Recommendation 1.1 of this report.

HPPG put a spotlight on what works in Indian country law enforcement: more "boots on the ground." What Indian country needs are more cops on the beat, in the community, providing deterrence and interdicting crime, and more and better criminal investigators. Significantly, simply moving Indian country toward parity with the rest of the United States in terms of police coverage would go far toward providing Indian country law enforcement with the resources Tribes need to fight crime. Law enforcement staffing levels are just one indispensable component of Tribal justice systems; the others deserve parity resourcing as well.

3.2: To generate accurate crime reports for Indian country, especially in Tribal areas subject to P.L. 83-280, Congress should amend the Federal Bureau of Investigation (FBI) Criminal Justice Information Services reporting requirements for State and local law enforcement agencies' crime data to include information about the location at which a crime occurred and on victims and offenders' Indian status. Similarly, it should require U.S. Department of Justice (DOJ) to provide reservation-level victimization data in its annual reports to Congress on Indian country crime. Congress also should ensure the production of data and data reports required by the Tribal Law and Order Act of 2010, which are vital to Tribes as they seek to increase the effectiveness of their law enforcement and justice systems, by allowing Tribal governments to sue the U.S. Departments of Justice and the Interior should they fail to produce and submit the required reports.

Reservation-level and aggregate Indian country data are critical to replicating the HPPG Initiative. When Tribes have accurate data, they can do their part in implementing similar strategies across their jurisdictions; but, without it, community assessment, targeted action, and norming against standards is impossible. This recommendation makes it possible for Tribes to hold their partner Federal agencies accountable in generating needed law enforcement information. Even for the four Native nations already experienced in HPPG methods, this recommendation provides tools that will help them improve further still.

FINDINGS AND CONCLUSIONS: IMPROVING INFORMATION SHARING STRENGTHENS PROSECUTION OF INDIAN COUNTRY CRIME

What works: Special Assistant U.S. Attorneys (SAUSAs). The Indian country SAUSA program makes it possible for U.S. Attorneys to appoint appropriately qualified prosecutors to work in the capacity of an Assistant U.S. Attorney for the prosecution of certain Indian country cases. A similar program has long been used to boost Federal prosecution on military bases and other Federal enclaves. Indian country SAUSAs have been used sporadically by U.S. Attorney's Offices in Indian country for 20 years. In 2009, however, DOJ made the use of SAUSAs in Indian country a policy priority—a welcome development that is strengthening Tribal governments' ability to prosecute cases and, in particular, accelerating Tribes' transition to the VAWA Amendments and TLOA.

The SAUSA model is a positive and worthwhile development in making Indian country safer. SAUSAs boost Tribal prosecutors' ability to protect and serve in at least two important ways. First, they sometimes work with their respective U.S. Attorney's Offices to refer cases arising on Indian lands so that the investigations do not fall through the cracks when the evidence permits Federal charges to be filed. Second, where Federal prosecution is not an option or may be less desirable, Tribal

prosecutors who also are SAUSAs can move forward more quickly with criminal charges under Tribal law. While SAUSAs don't have the final say, they do have increased leverage in some cases to ensure that matters are addressed.

Second, all Tribal SAUSAs are required to undergo a rigorous FBI background check prior to their appointment by a U.S. Attorney. This vetting allows SAUSAs to legally obtain access to Law Enforcement Sensitive (LES) information, such as Federal criminal investigative reports concerning cases arising in their communities. Especially in the many instances where Federal and Tribal jurisdiction may be concurrent, a Tribal prosecutor's access to LES information is vitally important. It determines how Tribal prosecutors are allocating resources and determining and implementing their public safety priorities.

In sum, the Commission finds that independent Tribal prosecutor's offices, consisting of attorneys who operate independently from Tribal councils or other governing bodies, and who are federally deputized as SAUSAs to ensure that LES information is protected, can be key assets for ensuring the timely and successful prosecution of Indian country crime. Federally deputized Tribal prosecutors are especially well-positioned to ensure that police service calls in the field are quickly and thoroughly reviewed; investigations proceed based on admissible evidence; criminal charges are evaluated and filed based on which jurisdiction (Federal, State, and/or Tribal) is involved; and justice is pursued through the appropriate judicial system in a way that respects victims and defendants' rights while appropriately allocating scarce resources.

The Hopi Indian Tribe, located in rural northeastern Arizona, provides an example of how important SAUSAs can be in improving the prospects of criminal prosecution in Indian country. Hopi has about 14,000 enrolled members with roughly 8,000 people living in 12 villages spread over 1.5 million acres. OJS is the primary law enforcement agency providing services to the Hopi people. The OJS organizational chart for the Hopi Tribe specifies 17 officers, 2 special agents, and a chief of police, but as of May 2013, there were just 9 patrol officers, 1 special agent, and a police chief providing services on the Hopi Reservation. According to the DOJ Nationwide Case Management Database, in 2011 alone there were more than 7,000 service calls by OJS at Hopi. Those same statistics report 15 major felonies committed in that same year. Among all of these cases, just 17 in total (felony and misdemeanor) were referred to the U.S. Attorney's Office, District of Arizona for review for Federal prosecution. Significantly, however, even these 17 cases represented a major increase in case referrals over the immediately preceding years. In all of 2006, for instance, DOJ reports show that only one Federal criminal case of any type was referred by the OJS Hopi Agency to the U.S. Attorney's Office, District of Arizona. Importantly, this progress coincided with the first-ever appointment of the tribe's chief prosecutor to serve as a SAUSA.¹⁸

The hurdle: poor information flows. Welcome as it is, the recent policy focus on SAUSAs often has not addressed a more fundamental issue: Federal agencies' stingy support of Tribal court proceedings. Many Federal officials still see information sharing with Tribal prosecutors' offices as more or less optional. The 2013 VAWA Amendments and the TLOA felony sentencing provisions clearly expand the role of Tribal prosecutors by providing more tools to address crime in their own courts. Undeniably, the VAWA Amendments and TLOA also contemplate that Tribal prosecutors will have access to timely, accurate, and comprehensive criminal justice information from the FBI, OJS, and other Federal agencies to be able to exercise Tribal concurrent criminal jurisdiction effectively.

Unfortunately, some Federal officials have yet to adjust to this new reality. The Commission has repeatedly received detailed reports that the FBI, OJS, and U.S. Attorney's Offices are either reluctant to provide Federal criminal investigative information to appropriately certified Tribal prosecutors or refuse to do so entirely. FBI cooperation with Tribal prosecutors' offices is often non-existent, and some OJS officials at the district or agency level (the very Federal officials who are supposed to serve as supporters and enablers of tribal TLOA and the VAWA Amendments implementation), are instead responding with indifference or even hostility when Tribes actually assert their sovereign rights.

In one particularly egregious instance earlier in 2013, the OJS Director became directly involved after an agency official refused to provide any criminal justice information to a Tribal prosecutor in a Federal jurisdiction where the Tribe had concurrent criminal jurisdiction. According to emails provided to the Commission, the local OJS official insisted that the Tribal prosecutor "fill out a Freedom of Information Act request." While absurd, Federal foot-dragging is too often the norm.

The Commission is encouraged that to correct such injustices, OJS national leadership has recently begun collaborating with Tribes to develop protocols for criminal justice information sharing with Tribal prosecutors' offices. Such collaborations have been driven by Tribal prosecutors who are understandably frustrated by OJS' inability to keep pace with expanded assertions of Tribes' concurrent jurisdiction.¹⁹ The resulting information-sharing protocols between Tribes and OJS are intended to ensure that Federal officials immediately disclose evidence in criminal cases to Tribal prosecutors who have been federally deputized as SAUSAs. The underlying assumption guiding these protocols is that the confidentiality and integrity of information is protected, and Tribal governments should have much greater use and control over criminal justice information regarding their citizens. Tribal prosecutors deputized as SAUSAs to ensure that the confidentiality of criminal justice information is protected are the key to enabling this process. Similarly, Tribal prosecutors' offices that function independently of their governing Tribal councils and other sources of political authority are vital to the information-sharing environment.

Another information flow problem that stymies the successful prosecution of Indian country crime is the routine refusal by many Federal law enforcement officials to testify as witnesses in Tribal court proceedings. Especially when a SAUSA has succeeded in bringing a case declined by the U.S. Attorney's office into Tribal court, testimony by Federal line officers and FBI agents may still be necessary. Yet, Federal guidelines have long restricted Federal law enforcement officials from testifying in Tribal or State courts without advanced permission. Some U.S. Attorneys have addressed this situation in recent years by developing protocols with Tribal courts to ensure that Federal law enforcement officials are available to testify in Tribal judicial proceedings when called upon to enforce Tribes' criminal laws. Creating and adhering to such protocols is especially important on Indian reservations that are primarily served by Federal police, and where, by definition, protecting the community means reinforcing a Tribe's exercise of its concurrent jurisdiction in criminal proceedings.

Still another information flow problem arises from the lack of criminal justice competence is that some Federal law enforcement officials, including the OJS officers, bring to investigations occurring in Indian communities. The Commission was provided with records of various cases demonstrating the importance of timely investigation to bringing charges in the relevant jurisdiction. This is primarily an OJS or FBI (i.e. Federal) responsibility. In other words, if Federal investigators do not move quickly or effectively to do their jobs, prosecutors cannot do theirs.

An all-too-typical example is illustrative. According to OJS and Tribal records, an adult Native American female was found in the bedroom of a reservation home; she was unconscious, naked, and appeared to have been raped. Her boyfriend also was in the room, fully clothed, and unconscious. Upon arrival at the hospital, the victim was in shock, suffering from lacerations to her vagina and had a blood alcohol content level of 0.5. According to the dispatch record, the OJS special agent ("SA Smith," a pseudonym) was called to investigate this case at 7:58 p.m. Only after receiving a directive from his supervisor did SA Smith arrive at this home at 12:21 a.m., nearly 4.5 hours later. By the time SA Smith got to the crime scene, the victim was at the hospital, and the three occupants of the house had been arrested and booked into the OJS detention center. The responding patrol officer had taken pictures and collected the victim's clothing; SA Smith had asked through dispatch that the suspects' clothing be collected at booking. SA Smith collected no evidence from the scene, though there were clearly blood and fluids in the carpet. SA Smith did not conduct any interviews. He did not interview anyone present at the home upon his arrival, nor the three intoxicated suspects at the home when the patrol officer arrived.

During the critical "golden hour" when (absent extenuating circumstances) evidence should be collected to preserve the viability of a potential criminal prosecution or prosecutions, by all accounts, SA Smith

did nothing. The local OJS office did not inform the Tribal prosecutor of the case for days. By the time the FBI was alerted—6 days later—the occupant of the house where the crime occurred had ripped out the carpeting and replaced it with tile. Whoever committed the crime has gone unpunished. Unfortunately, incidents like this happen all too frequently in Indian country. Where OJS provides primary policing on Indian lands, training and performance standards aimed at increasing professional competency can and must be improved.

A related obstacle facing Tribal reformers is the routine refusal by many Federal law enforcement officials to recognize the subpoena authority of a Tribe and testify as witnesses in Tribal court proceedings. Federal guidelines have long restricted Federal law enforcement officials from testifying in Tribal or State courts without advanced permission, according to extensive testimony provided to the Commission. In recent years, some U. S. Attorneys have addressed this situation by developing protocols with Tribal courts to ensure that Federal law enforcement officials are available to testify in Tribal judicial proceedings when called upon to enforce Tribes’ criminal laws. Creating and adhering to such protocols is especially important on Indian reservations that are primarily served by Federal police (OJS), and where, by definition, protecting the community means reinforcing Tribes’ exercise of their concurrent jurisdiction in criminal proceedings.

RECOMMENDATIONS

3.3: The Attorney General of the United States should affirm that federally deputized Tribal prosecutors (that is, those appointed as Special Assistant U.S. Attorneys or “SAUSAs” by the U.S. Department of Justice pursuant to existing law) should be presumptively and immediately entitled to all Law Enforcement Sensitive information needed to perform their jobs for the Tribes they serve.

SAUSAs appointed by U.S. Attorneys to prevent and punish violent crime within Indian country are the best available means for Indian Tribes and nations to effectively exercise concurrent jurisdiction under TLOA and the VAWA Amendments, and as provided by the Major Crimes and General Crimes Acts. But to do their jobs well, Indian country SAUSAs need full information. SAUSAs serving in other capacities (on military bases and other Federal enclaves, and with State and local anti-narcotics trafficking, gang prevention, and other task forces) already reap the benefit of LES information in their prosecutions; SAUSAs in Indian country should as well.

Given this clarified authority, Tribal governments and U.S. Attorneys (who are accountable to the U.S. Attorney General) can work to ensure that every federally recognized Indian Tribe that chooses to do so and invests in the requisite legal and professional requirements can have their Tribal prosecutors federally deputized. Federal criminal information will be presumptively made available as needed as soon as it is available, so

that these Tribal prosecutors can effectively assert their respective Tribes' concurrent criminal jurisdiction to make their communities safer and more just. Over time, as Tribes extend the exercise of their own criminal jurisdiction, the Federal government's direct role in dealing with many crimes may well diminish, while Tribes' comparative ability to police their own communities and enforce their own laws increases. This is as it should be in a country that values local governmental transparency, accessibility, and accountability.

3.4: The U.S. Attorney General should clarify the ability and importance of Federal officials serving as witnesses in Tribal court proceedings and streamline the process for expediting their ability to testify when subpoenaed or otherwise directed by Tribal judges.

3.5: To further strengthen Tribal justice systems, the Commission suggests that Federal public defenders, who are employees of the judicial branch of the Federal government within the respective judicial districts where they serve, consider developing their own program modeled on Special Assistant U.S. Attorneys.

Specifically, each Federal Public Defender's Office serving Indian country should be permitted to designate Tribal "Special Assistant Federal Public Defenders." This intriguing concept, which arose during testimony to the Commission by former Federal public defender Barbara Creel, now a law professor, is designed to facilitate closer working-level cooperation between Tribal and Federal public defenders.²⁰ This issue that only grows in importance as the VAWA Amendments and TLOA enhanced sentencing are implemented more widely. Tribal public defenders who are deputized federally could also enhance the protection of confidential criminal justice information, thereby encouraging even greater information sharing by Federal law enforcement agencies and U.S. Attorney's Offices at earlier stages in a given proceeding.

To summarize these recommendations, in terms of chain of command, the Commission recommends that the system be reformed so that it works this way: The U.S. Attorney, who is accountable to the U.S. Attorney General, deputizes the Tribal prosecutor to ensure confidential federally obtained information is respected. Finally, the Tribal prosecutor—as quarterback or expediter—decides how concurrent jurisdiction over the defendant(s) should be exercised. As an SAUSA, he or she reports to the U.S. Attorney's Office if Federal charges are filed; otherwise allegiance flows directly to the Tribe, just as it would with a military SAUSA (i.e., a Judge Advocate General who wears two hats and serves simultaneously in two justice systems, civilian and military) or a federally deputized State prosecutor on a joint Federal-State task force. In either sphere of sovereignty, chain of command and sovereign prerogatives are protected. The Tribe's governing council, in turn, enacts its own laws and policies to guarantee that the Tribal prosecutor's office operates independently from any political or outside influence.

Tribal leaders should be able to look to U.S. Attorneys (Presidential appointees with political accountability), and their offices as the chief point of contact for their day-to-day Federal criminal justice needs and requirements. In turn, U.S. Attorneys can work to ensure that every federally recognized Indian Tribe that chooses and invests in the requisite legal and professional requirements can have their Tribal prosecutors federally deputized. Federal criminal information from the FBI, OJS, and other Federal law enforcement agencies should be presumptively made available as needed, as soon as it is available, so that these Tribal prosecutors can effectively assert their respective Tribes' concurrent criminal jurisdiction to make their communities safer and more just.

Over time, as Tribes extend the exercise of their own criminal jurisdiction, the Federal government's direct role in dealing with many crimes may well diminish, while Tribes' comparative ability to police their own communities and enforce their own laws increases. This is consistent with our country's criminal justice system, which values local governmental transparency, accessibility, and accountability. The Commission looks forward to that day and in working to speed its coming.

FINDINGS AND CONCLUSIONS: EXPANDING FEDERAL JUDICIAL SERVICES

Recognizing the vital importance of Federal magistrate judges. TLOA states that the Commission “shall develop recommendations on necessary modifications and improvements to justice systems at the Tribal, Federal, and State levels, including consideration of...(4) the enhanced use of chapter 43 of title 28, United States Code (commonly known as ‘the Federal Magistrates Act’) in Indian country.”

During the course of its fieldwork, the Commission was privileged to hear public testimony from several U.S. magistrate judges who preside over Indian country cases. As provided by the Federal Magistrate Judges Act,²¹ U.S. magistrate judges are appointed on either a full- or part-time basis by the Chief U.S. District Court Judges within their respective Federal judicial districts. U.S. magistrate judges serve 8-year terms in the case of full-time positions or 4-year terms in the case of the many part-time positions that serve less-urban areas, especially in the West. This differs from U.S. District Court judges, who are appointed for life by the President of the United States and must be confirmed by the U.S. Senate pursuant to Article III of the U.S. Constitution. U.S. magistrate judges have limited criminal jurisdiction. Their authority in criminal justice matters is limited by statute to Class A misdemeanor jurisdiction (where the defendant has consented) and petty offenses.

Besides handling busy court dockets, U.S. magistrate judges provide often essential pre- and post-trial services, including initial appearances. Rule 5 of the Federal Rules of Criminal Procedure requires that officers

making arrests for violations of Federal law must take the arrested person “without unnecessary delay” before the nearest available Federal magistrate judge.²⁵ At the time, the defendant must be informed of the criminal charges as set forth in the complaint. Even in instances where the offenses charged can only be tried by a U.S. District Court judge, the U.S. magistrate judge’s role at this Rule 5 initial appearance is still extremely important. At the initial appearance, the U.S. magistrate judge “must inform the defendant of . . . the complaint against the defendant . . . [his] right to retain counsel or to request that counsel be appointed . . . the circumstances, if any, under which [he] may secure pretrial release . . . any right to a preliminary hearing; and [his] right not to make a statement, and that any statement made may be used against [him].”²⁴

The Commission received substantial testimony from representatives of all three sovereigns (Federal, State, and Tribal) regarding the tremendous importance of full- and part-time U.S. magistrate judges in and near Indian country. Without these positions, misdemeanor enforcement on many Indian reservations would be seriously degraded. Given the vital role that U.S. magistrate judges play at the initial appearance stage, felony dockets would suffer in both pre- and post-trial services. This includes expanding the Federal grand jury process, which is constitutionally required for any U.S. Attorney’s Offices to file criminal charges, to serve areas closer to Native communities.

For example, veteran U.S. Magistrate Judge David L. West explained how the District of Colorado recently seated the first-ever Federal grand jury in Durango, in part to enhance access for citizens of the Ute Mountain Ute and Southern Ute Indian Tribes. These Tribes are headquartered 400 miles and 360 miles away, respectively, from the U.S. District Courthouse in Denver. Magistrate Judge West worked with U.S. District Court Judge R. Brooke Jackson in Denver to establish this Durango grand jury as a means of creating a more representative pool in cases arising on Colorado’s Western Slope. The reaction from both Tribes, the U.S. Attorney’s branch office in Durango, and State and local authorities has been very positive. Magistrate Judge West’s considerable expertise in Indian country cases has also been a key asset to the District of Colorado’s current initiative, under Chief District Court Judge Marcia C. Krieger and her predecessor, Wiley E. Daniel, to hold more Federal criminal trials and other judicial proceedings in Durango, especially cases involving Tribal citizens. Finally, Judge West frequently travels to the Ute Mountain Ute and Southern Ute Reservations to conduct periodic training for Tribal, State, and local officials on Indian country criminal justice issues.

The Commission strongly supports the use of U.S. magistrate judges in and near Indian country, as well as the deployment of additional full- and part-time positions in underserved areas. Yet, there are obviously a great many other instances where only an Article III Federal judge can perform the roles in Indian country that are required by Federal law. The Commission notes that not one U.S. District Court judge is permanently

At least in the District of New Mexico, it's the magistrate judges who will do that initial analysis on any habeas corpus petitions, and do recommendations to the district judges of the ultimate outcome.

*Karen Molzen, Chief Magistrate Judge, U.S. District Court for the District of New Mexico
Testimony before the Indian Law and Order Commission, Hearing at the Pueblo of Pojoaque
April 19, 2012*

I think we were remiss in the way we handled Indian country. I am not saying we are home free, but I am saying we are closer than we have ever been. The grand jury has Native American members to it. The panel had Native American members. We have made some progress.

*David L. West, Magistrate Judge, U.S. District Court for the District of Colorado
Testimony before the Indian Law and Order Commission, Hearing at the Pueblo of Pojoaque
April 19, 2012*

I think that the nature of the business requires our holding court on Federal Indian country, but to do that I have to provide notice to the Senate and the House Judiciary Committees of what I did and why I did it. I went to our chief judge and I got her approval to do this if I would write the reports. But the report must contain, one, reasons for the order for the special session; two, how long the order lasted for; the impact of the order on the litigants; and the costs of the order to the judiciary.

*G. Murray Snow, Judge, U.S. District Court for the District of Arizona
Testimony before the Indian Law and Order Commission, Hearing at the Pueblo of Pojoaque
April 19, 2012*

I know you wanted me to talk about the trial I held in Shiprock. The reason for that is because I wanted to take the mystery out of what is involved in a Federal trial. I wanted to take the mystery out of what you do as a witness, what you do as a juror. We had simultaneous interpreting and we had earphones for everybody...We used the trial courtroom, and you know, the quarters were not the gorgeous quarters of the Federal courthouse, but I got no complaints from any of the jurors. The Tribal judge was absolutely wonderful. The jurors were great sport about it. We had a full courtroom. I mean we had visitors coming in and out. Navajo Nation President Joe Shirley was there to welcome everybody on the first day, and on the last day he shook all the jurors' hands and thanked them all for coming. It was a great experience.

*Martha Vazquez, Judge, U.S. District Court for the District of New Mexico
Testimony before the Indian Law and Order Commission, Hearing at the Pueblo of Pojoaque
April 19, 2012*

based in Indian country, nor are there any Federal courthouses there. Several distinguished U.S. District Court judges testified to the Commission about the need to bring more of a Federal judicial presence to Native communities.

Magistrate judges play a vitally important role in and near Indian country. Other witnesses who represented all three sovereigns testified to the difficulties posed when Federal court services are offered so far from Indian country. This is both a problem of cost and of a fair hearing venue (Chapter 5). One important solution—emphasized by Federal judges themselves—is to hold more trials, hearings, and other judicial proceedings on or near reservations.

In 2005, U.S. District Court Judge Martha Vazquez pioneered this approach in the District of New Mexico. At that time, she was the Chief Judge, and she held what was apparently the first-ever Federal criminal trial in Indian country in Shiprock, NM, on the Navajo Nation.²⁵ More recently, in September 2013, U.S. District Court Judge G. Murray Snow of the District of Arizona, who also testified before the Commission, announced plans to hold a portion of a Federal criminal trial in Tuba City, again on the Navajo Nation.²⁶

Such efforts should be strongly encouraged. While the Commission supports the transition of those Indian nations that so choose to exit Federal criminal jurisdiction except for crimes of general application, some Tribes may not go that direction, while other may take years or decades to do so. Strengthening Federal judicial access for Native people benefits all U.S. citizens.

Exploring the option of Special Federal Magistrate Judges. In 2008, National American Indian Court Judges Association President Eugene Whitefish proposed the concept of cross-deputizing Tribal court judges to serve as “Special Federal Magistrate Judges” to address several areas such as:²⁷

- Expediting the Federal criminal investigations, arrests, and indictments of crimes occurring in Indian country.
- Reducing the caseload of the U.S. magistrate judges regarding the initial appearances, and detention and probable cause hearings by establishing a new special division in Indian country.
- Supporting the law enforcement and prosecution of crimes committed in Indian country, along with the supporting the notion of appointing special prosecutors.
- Assisting in the creation of educational and training opportunities for both Federal and Tribal court personnel.
- Strengthening the Tribal, State, and Federal justice systems.

This proposal raises the question of whether and how Special U.S. magistrate judges should be used. The Commission notes that potential to expand the current U.S. magistrate judges' pool may present potential detriments as well as benefits that have not been studied or examined. Despite repeated attempts by the Commission to garner opinions on this topic, there was literally no public testimony or even correspondence from the Federal judiciary or Tribes on this concept. The use of Special U.S. magistrate judges may be an area where the Congress commissions an official governmental study, perhaps by the Congressional Research Service, to assess the pros and cons of this idea. As a practical matter, the Commission lacks subpoena power and was unable to obtain relevant information from the Judicial Conference of the United States or any other source to support any substantive recommendation.

RECOMMENDATIONS

3.6: Congress and the executive branch should encourage U.S. District Courts that hear Indian country cases to provide more judicial services in and near Indian country. In particular, they should be expected to hold more judicial proceedings in and near Indian country. Toward this end, the U.S. Supreme Court and the Judicial Conference of the United States should develop a policy aimed at increasing the Federal judicial presence and access to Federal judges in and near Indian country.

3.7: Congress and the executive branch should consider commissioning a study of the usefulness and feasibility of creating Special Federal Magistrate Judges.

FINDINGS AND CONCLUSIONS: FEDERAL FUNDING AND FEDERAL ADMINISTRATIVE REFORM

The Indian Law and Order Commission views Tribal governments as having the lead role in strengthening Tribal justice. Among other things, they must continue to develop the internal capacity to become more self-determined across all Tribal justice functions. They must be able to recruit and retain talented employees who can help them exercise greater local control in law enforcement, prosecution, and judicial processes. They must be able to communicate clearly and effectively with their Federal and State government partners about their justice capabilities and needs.

As the Commission's recommendations also indicate, most Tribal governments cannot accomplish these tasks on their own. They need two things: financial support and a more rational Federal administrative structure for the management of criminal justice programs in Indian country. The need for resources is obvious if Tribes are to pursue successful strategies such as the OJS HPPG Initiative. The need for reform is signaled in the difficulties SAUSAs experience with information flows.

The Commission also heard testimony about many other concerns that Tribes have about the current Federal structure, and intriguingly, these problems point an opportunity. Administrative changes at the Federal level should make it possible to redirect spending that at present is duplicative, over managed, and misallocated. Thus, reform may not only improve information sharing, but also generate savings, so that less “new money” is needed for investment in ideas that work.

The problems with grant funding. Since the late 1980s, DOJ has become a major funder of Indian country criminal justice infrastructure. In FY 2012, for example, Congress allocated \$316 million to DOJ Native American programs, with the largest shares to the Office of Justice Programs (\$134 million) and Bureau of Prisons (\$114 million).²⁸ By comparison, in FY 2012 Congress provided the U.S. Department of Interior \$346 million for law enforcement and justice programming, with the largest shares to law enforcement officers and criminal investigators (\$185 million), detention (\$82 million), and Tribal courts (\$23 million).²⁹

DOJ’s involvement has been of great benefit to Tribes. In some cases, it has developed programs explicitly for Tribal applicants; in others, it has opened funding streams formerly available only to State and municipal governments to Tribal governments. Tribes have taken advantage of these funds to, among other key investments, enhance their criminal codes, develop victim support programs, practice community-oriented policing, design wellness courts (Tribal drug courts), and create intertribal judicial bodies.

Despite these benefits, DOJ’s funding approach leaves much to be desired. Short-term, competitive grants for specific activities are not a good match for Indian country’s needs:

- Small Tribes and Tribes with thinly stretched human capital lack the capacity to write a “winning” application. These Tribes often have disproportionate criminal justice needs, and the grant process can prevent them from accessing DOJ funds altogether.
- To construct a full-bodied criminal justice system, a Tribe must apply for and win many single-issue grants with different deadlines and reporting requirements, which is a significant management challenge.
- Tribal governments legitimately query why they—unlike their State and local counterparts and in contradiction to the trust responsibility—should have to rely on such inconstant sources to pay for core governmental functions.⁵⁰
- Many Tribes are uncomfortable with the idea that for one Tribal government to “win” grant funds, other Tribes must “lose.”

Section 202(b)(3) of the Tribal Law and Order Act states that it is a central purpose of the Act is “to empower Tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country.” As the Federal government continues to implement the Tribal Law and Order Act, this purpose *must* be at the core of its programming and funding initiatives. If grant programs diminish sovereignty or discourage healing in any way, the programs need to be redesigned before the grants are ever announced. These types of ‘opportunities’ are merely a façade that serve only to pit us against each other and redirect our paths on a course that will likely lead to failure...

*Bernard Stevens, Vice-President of the Wisconsin Inter-Tribal Alliance for Justice
Written testimony for the Indian Law and Order Commission, Hearing at Santa Ana Pueblo, NM
December 14, 2011*³²

- Because grant funding is not renewable, it creates uncertainties in system planning, fuels costly employee turnover in Tribal criminal justice programs, and generates gaps in law enforcement and judicial processes that offenders can exploit.
- Grants reflect the Federal government's ideas about what kinds of investments and programs make sense in Tribal communities. Even "comprehensive" grant programs have tended only to stitch individual grants together onto a single application rather than allow Tribes freedom to determine their own spending priorities.⁵¹

The Commission has concluded that a mechanism other than grant funding must be found. Base funding from pooled resources, for example, may be a way to more permanently and stably fund criminal justice in Indian country.

Significantly, prior changes point toward fund consolidation. Beginning in the 1990s, DOJ undertook several pilot programs (for example, Tribal Strategies Against Violence and Comprehensive Indian Resources for Community and Law Enforcement) to test the process of making multiple grants accessible on a single application. With evidence that the strategy worked and was preferred by Tribes, DOJ institutionalized cross-program cooperation with the Coordinated Tribal Assistance Solicitation (CTAS). CTAS makes it possible for Tribes to use a single application and reporting system to access nine different competitive grant programs.

Pooling funds is the next logical step toward a more effective means of providing criminal justice funding to Tribes. Looking further afield, making block grants form a single pool of funds is the approach the U.S. Department of Housing and Urban Development implements through the *Native American Housing Assistance and Self-Determination Act of 1996*.

Overlapping functions. Grant funding is one of two major problems with the Federal administration structure for the management of Indian country programs. The other is even more fundamental: two Federal departments have substantial and substantially similar roles in the administration of Indian country justice programming. Both the U.S. Departments of the Interior and Justice provide funding for law enforcement, criminal investigation, prosecution, Tribal courts, and detention. Both offer technical assistance and training programs to strengthen these functions. Both are engaged in some direct service activities. Both sustain large and bureaucratic management structures for their programming in Indian country.

These arrangements create costly duplication, confusion concerning lines of accountability, and wasteful outcomes.⁵⁵ The problems that SAUSAs, as prosecutors deputized within the DOJ chain of command experience with OJS personnel, are just one aspect of a larger set of coordination problems.

The [Tribal Law and Order] Act does not provide an effective operational and developmental connection between the DOJ and DOI funded portions of the Tribal law enforcement systems programs.

*Ron Tso, Chief of Police, Lummi Nation
Testimony before the Indian Law and Order Commission, Hearing on Tulalip Indian Reservation
September 7, 2011*

For example, the Commission learned of:⁵⁴

- Detention facilities built with DOJ funds that once complete, could not be staffed because they were not included in the BIA budget for facilities operations and maintenance. (This problem is so common that it was the focus of a National Congress of American Indians General Assembly resolution in October 2012.⁵⁵);
- Duplicate grant awards that leave other critical tasks unfunded; for example, BIA and DOJ both provided a Tribe with funds for a computerized case management system, but neither agency provided for training, so the system went unused;
- A lack of collaboration concerning assessment and training programs, which create opportunities for conflicting instruction and advice; and
- A lack of coordination in the investigation function, such that FBI agents, OJS criminal investigators, and Tribal investigators frequently duplicate efforts, have access to different pieces of information, may not share the information they have, dispute the appropriate disposition of cases, and allow criminal investigations to be slow-tracked or disappear entirely.

Some of these problems could be resolved if Tribal governments were able to access DOJ Indian country resources via P.L. 93-638 contracts, self-governance compacts, or P.L. 102-477 funding agreements, all of which allow Tribal governments to take over the management of Federal funds. Tribal governments could then address coordination issues directly and save money by assuring more appropriate uses of funds in their communities. At present, they cannot: P.L. 93-638 and its amendments apply only to DOI and the U.S. Department of Health and Human Services' Indian Health Service, and P.L. 102-477 applies narrowly to formula-funded employment and training grants administered by the U.S. Departments of Education, Health and Human Services, Interior, and Labor. However, legislative amendments that expanded Tribes' contracting opportunities to include DOJ still would not reduce the waste inherent in maintaining two Federal Cabinet departments with nearly identical functions nor solve chain-of-command and accountability problems among personnel whose positions are not available for contracting (FBI agents, for example).

An alternative route would be to merge or combine these Federal responsibilities for Indian country criminal justice in a single Federal department. In fact, conversations about the possibility of merging DOI and DOJ Indian country criminal justice functions were begun nearly 20 years ago. In 1997, a proposal to do so was the central recommendation of the Executive Committee on Indian Country Law Enforcement Improvements.⁵⁶ The Executive Committee had gained substantial support for the change among Tribal governments, at DOJ, and within the BIA

And I know, as radical as this sounds, I would really see sort of the dismembering of the Bureau of Indian Affairs. ...Indian housing is pretty much handled through ONAP, Office of Native American Programs... Indian Health Service provides the Indian health component; Education Department handles the educational aspects of it; and I really firmly believe that Tribal law enforcement and Tribal court should go under the Department of Justice. ...I really do believe that the Bureau needs to get out of Tribal court and get out of law enforcement and leave it to the Department of Justice or the Department of Courts, I don't know. But I really think that those are better suited to address law enforcement and court systems in the United States Tribes.

*Dorothy Alther, Senior Staff Attorney with California Indian Legal Services
Testimony before the Indian Law and Order Commission, Hearing on Agua Caliente Reservation, CA
February 16, 2012*

Theresa Pouley, Commissioner: “Do you have an idea of what that better funding source would look like? So take the competitive grant funds and do what?”

Connie Reitman, Executive Director, Inter-Tribal Council of California: “Just a basic allocation and then the ability to access other funding to support that basic funding. I think that's one approach that we would really appreciate because then we get at least something.”

*Hearing of the Indian Law and Order Commission at Agua Caliente Reservation, CA
February 16, 2012*

But I think that part of the solution is that we are going to have to—all of the Tribes, all of the Feds, and all of the are going to have to look at working together collaboratively to seek the authorization from Congress to fund some of these elements because we're all neighbors. It affects all of us. And the better job we can do to accomplish that, I think the better it will be for law enforcement and justice.

*Ron Suppah, Vice Chairman, Confederated Tribes of Warm Springs
Testimony before the Indian Law and Order Commission, Hearing in Portland, OR
November 2, 2011*

Division of Law Enforcement Services. Ultimately, the then-Assistant Secretary for Indian Affairs' reported concerns about the loss of budget dollars apparently ended action on the proposal. Unlike the budget surpluses of the 1990s, such a decision is no longer affordable for the Federal government, and it has never been affordable for Tribes.

RECOMMENDATIONS

3.8: *Congress should eliminate the Office of Justice Services (OJS) within the Department of the Interior Bureau of Indian Affairs, consolidate all OJS criminal justice programs and all Department of Justice Indian country programs and services into a single “Indian country component” in the U.S. Department of Justice (including an appropriate number of FBI agents and their support resources), and direct the U.S. Attorney General to designate an Assistant Attorney General to oversee this unit. The enacting legislation should affirm that the new agency retains a trust responsibility for Indian country and requires Indian preference in all hiring decisions; amend P.L. 93-638 so that Tribal governments have the opportunity to contract or compact with the new agency; and authorize the provision of direct services to Tribes as necessary. Congress also should direct cost savings from the consolidation to the Indian country agency and continue to appropriate this total level of spending over time.*

3.9: *Congress should end all grant-based and competitive Indian country criminal justice funding in DOJ and instead pool these monies to establish a permanent, recurring base funding system for Tribal law enforcement and justice services, administered by the new Tribal agency in DOJ. Federal base funding for Tribal justice systems should be made available on equal terms to all federally recognized Tribes, whether their lands are under Federal jurisdiction or congressionally authorized State jurisdiction and whether they opt out of Federal and/or State jurisdiction (as provided in Recommendation 1.1). In order to transition to base funding, the enacting legislation should:*

- a. Direct the U.S. Department of Justice to consult with Tribes to develop a formula for the distribution of base funds (which, working from a minimum base that all federally recognized Tribes would receive, might additionally take account of Tribes' reservation populations, acreages, and crime rates) and develop a method for awarding capacity-building dollars.
- b. Designate base fund monies as “no year” so that Tribes that are unable to immediately qualify for access do not lose their allocations.

“The institutionalized Federal under-funding and over-control of Tribal justice systems has resulted in unacceptably high rates of violent crime and social alienation whose tragic effects extend well beyond Indian country into every State in the Union. By embracing the quintessential American value of local control and responsibility, and by targeting resources to achieve true baseline funding parity in Native communities, as Tribes do more for themselves and their citizens, Federal and State taxpayers throughout the United States will benefit.”

- c. Authorize the U.S. Department of Justice to annually set aside five (5) percent of the consolidated former grant monies as a designated Tribal criminal justice system capacity-building fund, which will assist Tribes in taking maximum advantage of base funds and strengthen the foundation for Tribal local control.

3.10: Congress should enact the funding requests for Indian country public safety in the National Congress of American Indians (NCAI) Indian Country Budget Request for FY 2014³⁷ and consolidate these funds into appropriate programs within the new DOJ Tribal agency. Among other requests, NCAI encourages Congress to fully fund each provision of the Tribal Law and Order Act of 2010 that authorizes additional funding for Tribal nation law and order programs, both for FY 2014 and future years; to finally fund the Indian Tribal Justice Act of 1993, which authorized an additional \$50 million per year for each of seven (7) years for Tribal court base funding; and to create a seven (7) percent Tribal set-aside from funding for all discretionary Office of Justice Programs (OJP) programs, which at a minimum should equal the amount of funding that Tribal justice programs received from OJP in FY 2010. In the spirit of NCAI's recommendations, Congress also should fund the Legal Services Corporation (LSC) at a level that will allow LSC to fulfill Congress' directives in the Tribal Law and Order Act of 2010 and Violence Against Women Act 2013 reauthorization.

CONCLUSION

All of the recommendations in this chapter are designed to strengthen Tribal justice and close the public safety gap that afflicts Native people and communities. These recommendations lay the groundwork—through policy and financial support—for the implementation of promising practices that *fight crime and increase Tribal local control and accountability*. In particular, the Commission intends them to provide Tribal governments with:

- The wherewithal to implement of strategies, based in part on the successful HPPG Initiative, which achieve force-level parity within all parts of Tribal justice systems.
- The confidence that Tribal prosecutors will have the very best information available to them and that Federal officials will share information on timely basis, and cooperate in Tribal and judicial proceedings, so Tribes can effectively assert their criminal jurisdiction.
- The capacity to expand the responsibilities and accountability of Tribal court systems and to make Federal judicial services more accessible to Tribal citizens.

By seeking to strengthen Tribal justice systems, Federal and State leaders will not only enhance public safety on Tribal nations, but also save taxpayers' money throughout the United States. The institutionalized Federal under-funding and over-control of Tribal justice systems has resulted in unacceptably high rates of violent crime and social alienation whose tragic effects extend well beyond Indian country into every State in the Union. By embracing the quintessential American value of local control and responsibility, and by targeting resources to achieve true baseline funding parity in Native communities, as Tribes do more for themselves and their citizens, Federal and State taxpayers throughout the United States will benefit.

Treating all groups of U.S. citizens equally, rather than systematically depriving Native communities of commensurate levels of funding, is the right thing to do. Denying them the ability through the State and Federal laws to secure adequate funding streams and develop their own reliable Tribal tax bases sufficient to fund basic governmental services and infrastructure is a failed policy that hurts rather than helps Federal taxpayers.

The era of Federal command-and-control policies over Native Americans living on Tribal homelands, set aside at great sacrifice for their perpetual benefit, has made Indian communities more dangerous, not less. The Commission was inspired by how Tribal governments continue to develop and implement effective, home-grown justice systems notwithstanding these challenges. Funding parity, reduced red tape, in conjunction with law enforcement, prosecution, and judicial services that are more directly accountable to the citizenry, are proven policies that achieve positive results. By focusing on what works, the Federal government can finally become part of the solution.

ENDNOTES

¹ U.S. Department of the Interior, Bureau of Indian Affairs, Office of Justice Services, *Lessons Learned, High Priority Performance Goals, 2009-2011: Mescalero, Rocky Boy's, Standing Rock, Wind River* (2012), 12-13, <http://www.bia.gov/cs/groups/xojs/documents/text/idc-018679.pdf>.

² U.S. Department of the Interior, Bureau of Indian Affairs, Office of Justice Services, *Lessons Learned, High Priority Performance Goals, 2009-2011: Mescalero, Rocky Boy's, Standing Rock, Wind River* (2012), 12-13, <http://www.bia.gov/cs/groups/xojs/documents/text/idc-018679.pdf>.

³ John Tierney, *Prison Population Can Shrink When Police Crowd Streets*, N.Y. TIMES, January 26, 2013, at A1, available at <http://www.nytimes.com/2013/01/26/nyregion/police-have-done-more-than-prisons-to-cut-crime-in-new-york.html?pagewanted=all&r=0>.

⁴ Julie Zauzmer, *Crime Fighter Cut Violent Incidents on Reservations*, WASHINGTON POST, June 26, 2013, http://articles.washingtonpost.com/2013-06-26/local/40202689_1_violent-crime-reservations-numbers-game.

⁵ *Examining Bureau Of Indian Affairs And Tribal Police Recruitment, Training, Hiring, And Retention: Hearing before the U.S. Senate Committee on Indian Affairs*, 111th Cong. 596 at 6-7 (2010) (statement of Senator Tim Johnson and testimony of Wizipan Garriott, Policy Advisor to the Assistant Secretary for Indian Affairs).

⁶ S. Hrg. 111-596 at 7, March 18, 2010, testimony of Wizipan Garriott.

⁷ *Id.*

⁸ The Department of the Interior received \$2.5 million in additional law enforcement funding in FY 2013, bringing its total spending for Indian country law enforcement to \$187.5 million; it has requested a \$5.5 million increase in FY 2014. See U.S. DEPARTMENT OF THE INTERIOR, BIA, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION, FISCAL YEAR 2014 at IA-OVW-2, available at <http://www.bia.gov/cs/groups/xocfo/documents/text/idc1-021730.pdf>. The Department of Justice received \$44 million for Community Oriented Policing Services grants to Indian country in FY 2011, a figure that fell to \$55 million in FY 2012. The Department's requests for 2013 and 2014 also are for \$55 million. See U.S. DEPARTMENT OF THE INTERIOR, FY 2013 NATIVE AMERICANS/TRIBES CROSSCUT FUNDING SUMMARY, at 3 (2013), <http://www.doi.gov/budget/upload/FY2013NativeAmericanCrosscut.pdf>, and U.S. DEPARTMENT OF THE INTERIOR, FY 2014 NATIVE AMERICANS/TRIBES CROSSCUT FUNDING SUMMARY at 5 (2013) <http://www.doi.gov/budget/upload/FY2014NativeAmericanCrosscut.pdf>.

⁹ P.L. 85-280 eliminated most Federal-Bureau of Indian Affairs Indian Country criminal jurisdiction in six states (California, Minnesota, Nebraska, Oregon, Wisconsin, and later Alaska) and mandated State criminal jurisdiction in Indian Country instead; other states could opt into the law. Chapter 1, "Jurisdiction," offers a more complete discussion.

¹⁰ "Settlement act tribes" typically had early contact with colonizers—often before founding of the United States. Many of Tribes gained Federal recognition and negotiated settlement terms with the Federal and relevant State governments only in the mid- to late-20th century; they include some or all of the Tribes in Maine, Rhode Island, Connecticut, and Florida, among others.

¹¹ DUANE CHAMPAGNE AND CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS UNDER PUBLIC LAW 280 (2012), 7.

¹² In *Los Coyotes Band of Chahuilla & Cupeno Indians v. Salazar et al.*, the Tribe argued that P.L. 85-280 did not extinguish Tribe's criminal jurisdiction or the Federal government's law enforcement responsibility, making the tribe eligible for a P.L. 95-638 law enforcement contract. The Department of the Interior took the position that it was entitled to establish its public safety funding priorities for non-P.L. 85-280 tribes, as P.L. 85-280 Tribes already have States providing criminal justice services. The U.S. Court of Appeals for the Ninth Circuit upheld the Department's position. No. 11-57222, 2013 WL 4734037 (9th Cir. 2013.) available

at, <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/09/04/11-57222.pdf>.

¹⁵ *Los Coyotes Band*, *supra*, slip op. at 50.

¹⁴ M. Brent Leonhard, *Returning Washington PL-280 Jurisdiction to its Original Consent-Based Grounds*, GONZAGA L. REV. 663, 719 (2012), available at http://www.law.gonzaga.edu/law-review/files/2012/06/Leonhard.final_revised.pdf.

¹⁵ Ross Naughton, *State Statutes Limiting the Dual Sovereignty Doctrine: Tools for Tribes to Reclaim Criminal Jurisdiction Stripped by Public Law 280?*, 55 UCLA L. REV. 489, 498-99 (2007) (internal quotation and citation omitted) available at, <http://www.uclalawreview.org/pdf/55-2-5.pdf>.

¹⁶ Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, (1975)(emphasis added).

¹⁷ Andrea Nagy and Joel Podolny, *William Bratton and the NYPD*, Yale Case 07-0115, Yale School of Management (2008), http://som.yale.edu/sites/default/files/files/Case_Bratton_2nd_ed_Final_and_Complete.pdf

¹⁸ The prosecutor, Jill Engel, who now serves with the State District Attorney's Office in Colorado Springs, notes the importance of tribal SAUSAs working cooperatively with their respective U.S. Attorney's Offices in order to modernize outmoded tribal criminal laws so as to take advantage of TLOA enhanced sentencing. In one recent case, a 62-year-old medicine man was convicted of raping one of his patients. The U.S. Attorney's Office lacked sufficient evidence to prosecute the case federally, so it was prosecuted by the Hopi Tribal Prosecutor's Office. Under the Tribe's pre-TLOA criminal code, the only applicable tribal offense, an outdated crime requiring proof of the "unlawful carnal knowledge" of a woman, meant that the defendant could only be sentenced to 5 years' detention, compared with a national average of 14 years for similar offenses elsewhere according to U.S. Department of Justice statistics. The Hopi Tribe has since modernized its Law and Order Code, consistent with TLOA, to provide a penalty in future cases of up to 9 years' imprisonment. Laura Morales, *From Cops to Lawyers, Indian Country Copes with High Crime*, ALL THINGS CONSIDERED, NATIONAL PUBLIC RADIO, Aug. 5, 2013, <http://www.npr.org/2013/08/05/207067518/from-cops-to-lawyers-indian-country-cope-with-high-crime>.

¹⁹ In one notable example, prosecutor Engel, *supra* note 18, representatives of the United States Attorney's Office for the District of Arizona, and the Indian Law and Order Commission drafted a model prosecution information-sharing protocol to ensure that the BIA-OJS officers be required to provide case-specific information immediately to Tribal prosecutors for use in Tribal charging-decisions under Tribal law. The BIA-OJS reports that this protocol is now being used nationally as a best practice with various Indian tribes to enable them to more effectively assert concurrent jurisdiction under TLOA and the VAWA Amendments. Commission interview with Darren Cruzan, Director, BIA-OJS, Sept. 3, 2013, on file with the Commission.

²⁰ Testimony of Barbara Creel, Hearing of the Indian Law and Order Commission, Pueblo of Pojoaque, NM, April 19, 2012, on file with the Commission.

²¹ 28 U.S.C. § 631 et seq.

²² 28 U.S.C. §636 provides in pertinent part:

- (a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—
- (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
 - (2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of Title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;
 - (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;
 - (4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)

(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

²⁵ Fed. R. Crim. P. 5(a). If a U.S. Magistrate Judge is unavailable, state or local judicial officers may perform this function as provided by 18 U.S.C. § 3041.

²⁴ Fed. R. Crim. P. 5(d)(1).

²⁵ Testimony of Martha Vazquez, Hearing of the Indian Law and Order Commission, Pueblo of Pojoaque, NM, April 19, 2012, on file with the Commission.

²⁶ See *Navajo Nation courthouse to host federal trial*, Associated Press, Sept. 4, 2013, <http://wrwb.membercenter.worldnow.com/story/23333393/navajo-nation-courthouse-to-host-federal-trial> (viewed September 12, 2013).

²⁷ This concept arose on February 20, 2008, when National American Indian Court Judges Association (NAICJA) President Eugene Whitefish met with U.S. Attorney General Michael B. Mukasey, Gretchen C.F. Shappert, U.S. Attorney for the Western District of North Carolina, Tracey Toulou, Director, Office of Tribal Justice, and several Tribal leaders, to discuss the issues of law enforcement and crime in Indian Country. For a description of this meeting, see *Hearing on Tribal Courts and the Administration of Justice in Indian Country, Before the U.S. Senate Committee on Indian Affairs*, 110th Cong. 576 (2008) (prepared statement of Hon. Roman J. Duran, First Vice President, National American Indian Court Judges Association), 14, available at http://www.indian.senate.gov/public/_files/July242008.pdf.

²⁸ U.S. DEPARTMENT OF THE INTERIOR, FY 2014 NATIVE AMERICANS/TRIBES CROSSCUT FUNDING SUMMARY at 4-5 (2013), <http://www.doi.gov/budget/upload/FY2014NativeAmericanCrosscut.pdf>.

²⁹ U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, BUDGET JUSTIFICATION AND PERFORMANCE INFORMATION, FISCAL YEAR 2013, at IA-PSJ-1, <http://www.bia.gov/cs/groups/public/documents/text/idc016442.pdf>.

³⁰ State and local governments also compete for grants from the U.S. Department of Justice. The point, however, is that these governments usually do not rely on DOJ funds for core services. Instead, States and localities often use DOJ funds to expand existing services or to test a new idea.

³¹ See the description of CTAS, the Coordinated Tribal Assistance Solicitation at <http://www.justice.gov/tribal/grants.html>.

³² Bernard Stevens, Testimony to the Indian Law and Order Commission, Hearing Santa Ana Pueblo, NM, December 14, 2011, 4-5, http://www.indianlawandordercommission.com/resources/documents/ILOC%20FH_AibuNM_Testimony_BStevens.pdf.

³³ See also, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS, GAO-11-252 (February 2011), <http://www.gao.gov/assets/320/315698.pdf>. In fact,

the problem is not just a DOI-DOJ problem; in 2005 and 2010 the DOJ Office of the Inspector General criticized DOJ for poor coordination among its own programs serving Native communities as well. Since 2010, DOJ has made strides in program coordination—including creation of a single grant application for multiple tribal opportunities—but the process is far from complete, since these grant opportunities still are not co-located within a single office of DOJ nor are they available for P.L. 93-638 style contracting.

³⁴ Examples are drawn from field hearings, Commissioner experiences, and U.S. GOVERNMENT ACCOUNTABILITY OFFICE, INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS, GAO-11-252 (February 2011), <http://www.gao.gov/assets/320/315698.pdf>.

³⁵ Request that the Bureau of Indian Affairs Provide Consistent, Full, and Adequate Funding to Sustain Tribal Justice Programs, including Tribal Detention Facilities, National Congress of American Indians Resolution #SAC-12-055 (2012), available at http://www.ncai.org/attachments/Resolution_jSvZtuCynZtzdmitVPOXQKcZkACuPIALulmgsEoYGwlbQhlorON_SAC-12-055.pdf

³⁶ U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION. REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS: FINAL REPORT TO THE ATTORNEY GENERAL AND THE SECRETARY OF THE INTERIOR, (1997), <http://www.justice.gov/otj/icredact>.

³⁷ National Congress of American Indians, *Public Safety and Justice, in* INDIAN COUNTRY BUDGET REQUEST FY 14 at 25-32, accessed August 28, 2013, http://www.ncai.org/resources/ncai-publications/indian-country-budget-request/fy2014/04_NCAI_2014_Budget_Request_Public_Safety.pdf



INTERGOVERNMENTAL COOPERATION: ESTABLISHING WORKING RELATIONSHIPS THAT TRANSCEND JURISDICTIONAL LINES

Stronger coordination among Federal, State, and Tribal law enforcement can make Native nations safer and close the public safety gap with similarly situated communities. Enhanced coordination is also a proven way to combat off-reservation crime. The Federal government cannot and should not force Tribal and State leaders to work together. Local priorities and concerns ought to drive cooperation, and it needs to be voluntary. But the President and Congress can promote and support more positive forms of collaboration. This chapter focuses on how many Native officials are working with their State and Federal counterparts to share information, training, and services. Additionally, the chapter suggests steps that can be taken now to build on and accelerate that progress.

The Indian Law and Order Commission finds that whether in the form of law enforcement agreements between Tribes and State or local law enforcement agencies or by legislation giving Tribal police the full range of State police officer powers, cooperation among agencies at the local level works most effectively to ensure comparable responses to crimes in Indian country. When crimes involve non-Indians in Indian country, and as discussed elsewhere in this report, Tribal police have only been able to exercise authority to detain a suspect, not to make a full arrest. This lack of authority jeopardizes the potential for prosecution, the security of evidence and witnesses, and the Tribal community's confidence in effective law enforcement.

However, great promise has been shown in those States where intergovernmental recognition of arrest authority occurs. It is also true wherever intergovernmental cooperation has become the rule, not the exception, that arrests get made, interdiction of crime occurs, and confidence in public safety improves. Of equal importance, the cooperation of Federal agencies with Tribal public safety agencies is critical to success in Indian country. Such cooperation includes the prompt and efficient issuance of deputization agreements and Special Law Enforcement Commissions (SLECs).¹ Also important are the timely sharing of criminal justice information and the notification to Tribes of arrests, dispositions, and reentry of American Indian Federal prisoners.

These goals and principles are mandated by the Tribal Law and Order Act (TLOA). Through the Act's findings, Congress and the President acknowledged that Tribal police officers usually are the first responders to address crimes on Indian reservations.² More generally, TLOA aspires to create greater cooperation among Tribal, Federal, and State law enforcement departments and agencies. While acknowledging the limits of what Federal law can and should impose on State and Tribal governments, nonetheless the Act authorizes some Federal support and encouragement for intergovernmental agreements ranging from mutual aid agreements, to cross-jurisdictional training, to the deputization of Tribal and State officials and Federal peace officers for the enforcement of Federal criminal laws within Indian country.

For example, the U.S. Attorney General is empowered to “provide technical and other assistance to State, Tribal, and local governments that enter into cooperative agreements, including agreements relating to mutual aid, hot pursuit of suspects, and cross-deputization for the purposes of: (1) improving law enforcement effectiveness; (2) reducing crime in Indian country and nearby communities; and (3) developing successful cooperative relationships that effectively combat crime in Indian country and nearby communities.”³

The Commission heard extensive testimony from representatives of Tribes that operate under legal arrangements that recognize Tribal police authority on par with the State and local police and from those that employ Federal Bureau of Indian Affairs SLECs, (also discussed in Chapter 1). The Commission was encouraged by these reports, but believes more progress is needed, particularly with the approval of SLECs and with the recognition of Tribal police authority in P.L. 83-280 States. To facilitate this cooperation, more is needed to ensure tort liability coverage for Tribal police officers, with an expansion of the Federal Tort Claims Act (FTCA) as necessary. Public pension eligibility and portability are of particular importance to the hiring and retention of Tribal law enforcement personnel.

The Commission believes that ultimately more progress in public safety will come from voluntary efforts to improve cooperation and coordination among the sovereigns—Federal, State, and Tribal—and from

local efforts, such as State legislation and local agreements, than from the imposition of Federal preemptive authority and policies. As noted, the Federal government can and should provide incentives and assistance to facilitate local improvements.

Additionally, the Federal government has an independent obligation to improve its own coordination with Tribal law enforcement agencies. This includes reporting systems that “track” the offender and criminal information sharing.

FINDINGS AND CONCLUSIONS: LAW ENFORCEMENT AGREEMENTS

A principal goal in intergovernmental cooperation is to find the right mechanisms to facilitate the entry into Tribal-State and Tribal-Federal law enforcement agreements and Memoranda of Agreement (MOAs) or Memoranda of Understanding (MOUs), including SLECs and local deputation and cross-deputation agreements. The Commission learned there are unconscionable administrative delays and impediments in the processing and approval of SLECs. With respect to Tribal-State-local MOUs, there are questions of (1) local reluctance to expose State-local to third-party liability without adequate insurance coverage, and (2) ensuring that Tribal police agencies and officers obtain respective State Peace Officer Standards and Training (POST)⁴ or equivalent certification as a prerequisite to recognition as peace officers under any agreement or legislative program.

As to tort liability, Congress should either extend the FTCA (discussed below) to qualified Tribal police forces or create a federally sponsored insurance pool for Tribal police forces to enter into as a means to facilitate the MOUs. To ensure that POST certification is an option, funding is needed to underwrite Tribal police officers obtaining POST certification unless the officers already have POST certificates. Most States require not only the officers, but also the police department to be POST certified, which triggers additional expenses and administrative work.

Full Tribal jurisdictional option. Of course, if a Tribal government opts for the Tribal jurisdiction plan as proposed in this report (Chapter 1), its Tribal justice agency will have clear arrest and prosecutorial authority over all suspects/defendants on the reservation. However, even under the proposed Tribal jurisdiction plan, Tribes will need to cooperate with Federal, State, local, and other Tribal authorities to share resources and training, enter into cooperative agreements, and develop mutually supporting justice programs to improve and sustain acceptable levels of public safety. Not all Tribal governments will want to pursue broader jurisdiction. Many Tribes are small in geography or population and lack resources to exercise justice authority. They likely will stay within Federal or P.L. 83-280 arrangements under which they currently do not have effective arrest authority, at least

People living on the reservation deserve all the resources available to them in a moment of crisis. To the woman facing assault, to the child who is being abused who is crying out for help, it doesn't matter what uniform the police officer is wearing or what decal is on the door of that police car. In that moment of fear, in that moment of crisis, people just want to be safe and secure.

*Leroy "J.R." LaPlante, Secretary of Tribal Relations, State of South Dakota
Testimony before the Indian Law and Order Commission, Hearing on the Rosebud Indian Reservation, SD
May 16, 2013*

without authorizing legislation, deputization agreements, or SLECs. Thus, the importance of intergovernmental cooperation is paramount—necessary for strengthening arrest powers and responding effectively to incidents, particularly those involving violence, and the victims involved.

SLECs. With a Special Law Enforcement Commission, a Tribal police officer, employed by a Tribal justice agency, can exercise essentially the same arrest powers as a Bureau of Indian Affairs (BIA) officer assigned to Indian country, without compensation by the Federal government.⁵ BIA policy states that SLECs are to be issued or renewed at the BIA's Office of Justice Services (OJS) discretion and only when a legitimate law enforcement need requires issuance.⁶ SLECs enable BIA to obtain active assistance in the enforcement of applicable Federal criminal statutes. The issuance of a SLEC requires an agreement with a Tribal government law enforcement agency, called a "deputization agreement." As the SLEC is to aid in the enforcement or carrying out applicable Federal laws in Indian country, it should enable a Tribal police officer to make an arrest for a violation of the General Crimes Act, 18 U.S.C. § 1152, or the Major Crimes Act, 18 U.S.C. § 1153, at least in the non-P.L. 85-280 States and Tribal jurisdictions.

While the SLEC appears to be precisely the kind of inter-governmental cooperation that would greatly enhance public safety in Indian country, the Commission heard testimony that BIA certification of the SLEC commissions is often delayed far too long. While SLEC training may involve 3 days of training (and renewal every 3 years), the BIA-run process for certification often takes 1 year or more. Some delays are attributable to the need for background investigations, which often are delayed for bureaucratic reasons. The Commission learned that over time, many non-Tribal jurisdictions fall away completely from the SLEC program, and even Tribal governments are sometimes forced to abandon or limit the number of participating officers. The limited geographic locations in which SLEC training typically is offered also limits the program's success and availability.

The Commission believes that management of SLECs should move from the BIA to the U.S. Department of Justice (DOJ) to speed up training and certification. DOJ should take inventory and report back to Congress every year. If deputization agreements and SLEC applications are not acted upon in 30 days, they should be deemed approved absent an affirmative showing to the contrary.

State and local agreements. The Commission believes the recognition of Tribal government and jurisdictional powers through agreements with State and local jurisdictions will develop partnerships, allow the sharing of knowledge and resources, and result in better chances to coordinate police enforcement, thereby strengthening public safety for Tribal reservations and nearby communities.⁷ Greater intergovernmental cooperation often results in better services for Indian country: more cost effective, culturally compatible, and with better arrest and prosecution rates.⁸

Nowhere has this been more promising than in the entering into of MOUs or other similar agreements between local law enforcement agencies and Tribal public safety agencies to permit or deputize the Tribal officers to enforce State criminal law. States have either authorized or countenanced different forms of such agreements, but in most cases MOUs have served to ease the burden of the non-Indian police forces that often cannot respond timely to the calls for assistance. Additionally these agreements have allowed a full arrest of a suspect, securing a crime scene, protecting evidence and witnesses, and ensuring appropriate arraignment and prosecution.

States such as Michigan have encouraged deputization agreements. Of the 10 Tribes that maintain Tribal law enforcement departments, 9 have agreements with a local jurisdiction or local police.⁹ These agreements take the form of deputization of Tribal officers by the county sheriff. While there is no statewide agreement for deputizing Tribal police, the local jurisdictions have entered into the agreements. Additionally, they allow for cross-deputization of Tribal and county officers to enforce each other's laws under certain limitations.¹⁰ MOUs in most other jurisdictions allow deputization of the Tribal police without deputizing the county officers to act as Tribal agents.

Arizona presents one positive example where Tribal police are encouraged to take State POST certification training and then enforce State law as Tribal police. Arizona's unique environment encourages and supports cross-deputization agreements. An Arizona statute allows Tribal police officers who meet Arizona State qualification and training standards to exercise all law enforcement powers of peace officers. When the designation expands jurisdiction, an MOA of mutual aid is necessary. Currently, 6 of the 22 Tribes in Arizona participate in this arrangement, and the number is expected to grow. A side benefit of the arrangement is that relationships between Native and non-Native officers form and grow because they attend the same academy and POST-education events.

Additionally, certified Tribal police in Arizona may qualify for the State's public safety retirement plan, provided that their Tribal employers have joined that plan. Because certified Tribal police are regularly attracted to better pay and benefits found in local and State police departments, the importance of Tribal officers being included in the State's retirement plan cannot be overstated. Intergovernmental agreements are working well for improving Tribal law enforcement and arrest powers on reservations in Arizona. When a sheriff's deputy is trained with the Tribal officer, everyone benefits and professionalism is enhanced.

Oregon is another State where, by legislation, peace officer powers are granted to qualifying Tribal police officers. Oregon Senate Bill 412 was signed into law in July 2011, and has worked well to allow arrests by Tribal police of both non-P.L. 83-280 Tribes (e.g., Warm Springs and Umatilla), and P.L. 83-280 Tribes that develop a Tribal police force.

Multiple safeguards were enacted to allay fears that Tribes would abuse the powers granted. Among them are the requirements that to qualify an officer, the Tribe must be bound by an approved deadly physical force plan, retain and allow inspection of relevant records, preserve biological evidence in the same manner as other police agencies, and waive sovereign immunity as to tort claims asserted in the Tribal government's court that arise from the conduct of an authorized Tribal police officer. These requirements arguably impose restrictions on the sovereign prerogatives of the Tribe participating, but the public safety benefits are indisputable. And keeping communities safe lies at the very heart of any sovereign's duty to its citizens.

Significantly, Oregon Senate Bill 412 addressed the issue of liability insurance. It requires a participating Tribal police agency to demonstrate it is self-insured for both public liability and property damage for vehicles operated by authorized Tribal police officers and that it carries police professional liability insurance. The policy must be sufficient to satisfy settlements and judgments arising from the tortious conduct of authorized Tribal police officers in an amount equal to or greater than comparable amounts applicable to a local public body.

California is an example of a State where Tribal-local law enforcement agreements have not flourished. In 1999, a State bill very similar to Oregon's Senate Bill 412 almost passed; it would have recognized Tribal police officers from certified Tribal police departments as "peace officers" under the State penal code, with full powers of arrest over any individual suspect. At the last minute, the bill failed because of reported concerns by legislators and local officials that Tribes exercising sovereign immunity would be shielded and instead parties would be directed toward the deeper pockets of the county government's coffers.

To facilitate MOUs, the liability question must be addressed. Oregon has provided a statutory scheme that requires the Tribe to self-insure, but not every Tribe can afford or is willing to do so, nor will States uniformly adopt the same policy approach as Oregon.

In non-P.L. 83-280 States, the use of SLECs calls for expanding the FTCA to be made unequivocally applicable to qualifying Tribal police departments. In instances of deputization agreements in both P.L. 83-280 and non-P.L. 83-280 States, an affordable insurance pool mechanism should be made available. Otherwise this impediment to reaching MOUs or legislative parity will remain elusive in many jurisdictions.

Finally, to facilitate MOUs for deputization arrangements, Tribes need the financial resources to participate in the requisite POST training in the State where they are located. The Federal government can facilitate this training without imposing preemptive standards or policies. Public safety is best accomplished at the local level, and providing the resources for training is a simple and straightforward step in the right direction.

Probably one of the biggest supporters [of Oregon peace officer status for Tribal police] that helped us ... was the Oregon Chiefs of Police Association, which I am a member of, and my fellow chiefs are all members of it. They understand the sheriffs' argument, but they thought, "Okay, well, it's an impediment to public safety; so what's the big deal?"

*Tim Addleman, Chief of Police, Confederated Tribes of the Umatilla Reservation
Testimony before the Indian Law and Order Commission, Portland, OR
November 2, 2011*

Most of our Indian lands are not identifiable by signs, particularly the allotted areas. Generally people know if they see a casino that it's Indian country, (whether they're) the public or law enforcement. I can tell you that with many of our casinos, it does become confusing at times. We have casinos that have adjoining motels. The motel is not Indian country, yet it's all one building. And so you can move into and out of Indian country without even leaving a building. Obviously our parking lots are very similar. And we work in partnership with our local law enforcement to address a lot of these crimes.

*Jason O'Neal, Chief of Police, Chickasaw Nation Lighthorse Police Department
Testimony before the Indian Law and Order Commission, Oklahoma City, OK
June 14, 2012*

So when we realized how big of a problem we had, we had to attack it from both sides. We had to educate the Tribal community about us as service providers, but we also had to educate our department about the communities we were serving.

*Ray Wood, Lieutenant & Tribal Liaison, Riverside County Sheriff's Department
Testimony before the Indian Law and Order Commission, Hearing on the Agua Caliente Reservation, CA
February 16, 2013*

Sharing resources, training, and meetings. The Commission also notes that intergovernmental cooperation, with or without MOUs for Tribal law enforcement, should include regular meetings between Tribal, State, county, city leaders, and administrators. The Ute Mountain Ute Law Enforcement Working Group discussed below demonstrates the advantages when strategies and resources are pooled, when advice and training are shared, and, in particular, when each other's history and culture are imparted. The Commission learned of several success stories, notably in Riverside and San Diego Counties in California, in which local law enforcement agencies engendered a significantly improved relationship with Tribal communities as the result of such meetings.

Another significant need is for ongoing criminal jurisdiction training for all concerned; indeed, failure of law enforcement to fully appreciate the relevant law creates obstacles for effective joint law enforcement. California instituted training for all officers on the subject of Tribal jurisdiction in its basic POST training, which has proven helpful in changing the basic understanding of the officers joining the force. This training is needed to build trust so that Tribal community members welcome county, State, and Federal police as supporters of public safety and community well-being. Additionally, county and State officials and policy makers would benefit from a greater understanding about Tribal culture, history, justice institutions, and expectations, which would lead to greater consensus and cooperation, mutual support, and co-governance and co-management regarding justice issues.

RECOMMENDATIONS

4.1: Federal policy should provide incentives for States and Tribes to increase participation in deputization agreements and other recognition agreements between State and Tribal law enforcement agencies.

Without limitation, Congress should:

a) Support the development of a model Tribal-State law enforcement agreement program that addresses the concerns of States and Tribes equally, to help State legislatures and governors to formulate uniform laws to enable such MOUs and agreements in both P.L. 83-280 and non-P.L. 83-280 States;

b) Support the training costs and requirements for Tribes seeking to certify under State POST agencies to qualify for peace officer status in a State in a deputization agreement;

c) Create a federally subsidized insurance pool or similar affordable arrangement for tort liability for Tribes seeking to enter into a deputization agreement for the enforcement of State law by Tribal police;

d) For Tribal officers using a SLEC, amend the Federal Tort Claims Act¹¹ to include unequivocal coverage (subject to all other legally established guidelines concerning allowable claims under the Act), not subject to the discretion of a U.S. Attorney or other Federal official; and

e) Improve the SLEC process by shifting its management to the U.S. Department of Justice and directing DOJ to streamline the commissioning process while retaining the requirements necessary to ensure that only qualified officers are provided with SLECs. (Also see Recommendation 4.8.)

FINDINGS AND CONCLUSIONS: TRIBAL NOTIFICATION OF ARREST, COURT PROCEEDINGS, AND REENTRY

The need for notification. On the Federal side, the Commission heard ample testimony that U. S. Attorneys' Offices sometimes do not communicate effectively, or at all, with Tribal jurisdictions when declining a case for Federal prosecution, notwithstanding TLOA's declination reporting requirement. Because the local Tribal courts are almost never notified, they often do not exercise their concurrent jurisdiction and address the matter in Tribal court.

Overlooking Tribal courts in this manner, as State and Federal officials tend to do, is tragic and unnecessary. By ignoring the communities where offenders and their families live, needless cost and expense are borne by State and Federal taxpayers.

Tribal government notification at the time of a Tribal citizen's arrest, coupled with appropriate Tribal government involvement from that point forward (during trial, detention, and reentry), can be expected to improve outcomes for the offender, for the offender's family and Tribe, and improve law enforcement outcomes overall.¹² Yet at present, Tribal governments have inadequate involvement when their citizens are arrested, prosecuted, and incarcerated by the Federal and State governments.

Native offenders are sometimes incarcerated hundreds of miles away from their families and communities.¹⁵ To illustrate the scope of the problem, in 2011, 3,500 self-identified American Indians were in custody in Federal prisons, and 14,600 Indians were housed in State prisons. During the same year, local non-Indian jails held 9,400 Indians, while jails in Indian country had jurisdiction over 2,239 Indians.¹⁴ It is virtually impossible to track from reported data where these Native Americans and Alaska Natives are being held. This can and must change.

The Commission strongly supports the reporting and compiling of individual offender data so that Tribal courts can be informed on a timely basis to be able to assert their own concurrent jurisdiction. The use of

Tribal courts gives Tribes more local control and accountability, while relieving State and Federal jurisdictions of much of these costs.

RECOMMENDATIONS

4.2: Federal or State authorities should notify the relevant Tribal government when they arrest Tribal citizens who reside in Indian country.

4.3: When any Tribal citizen resident in Indian country is involved as a criminal defendant in a State or Federal proceeding, the Tribal government should be notified at all steps of the process and be invited to have representatives present at any hearing. Tribes should similarly keep the Federal or State authorities informed of the appropriate point of contact within the Tribe. These mutual reporting requirements will help ensure the effective exercise of concurrent jurisdiction, when applicable, and the provision of wrap-around and other governmental services to assist the offender, his or her family, as well as the victims of crime.

4.4: All three sovereigns—Federal, State, and Tribal—should enter into voluntary agreements to provide written notice regarding any Tribal citizens who are reentering Tribal lands from jail or prison. This requirement should apply regardless if that citizen formerly resided on the reservation. This policy will allow the Tribe to determine if it has services of use to the offender, and to alert victims about the offender’s current status and location.

FINDINGS AND CONCLUSIONS: INTERGOVERNMENTAL DATA COLLECTION AND SHARING

Data are hard to find and access. Accurate data is an important tool for supporting effective law enforcement and prosecutions. Unfortunately, the BIA, the Federal Bureau of Investigation (FBI), and virtually all other Federal law enforcement agencies serving Indian country have collected and analyzed very little data on Indian people and communities. For instance, it was not until 2009, when prompted by complaints from U.S. Attorneys, did the FBI begin to separate out certain Indian country crimes in its annual Crime in America reports. Labor reports, jail statistics, and census data tend to be the main forms of data collected, with little data on Tribal crime and related issues.

The many ways in which Tribal governments form justice courts, police departments, jails, and rehabilitation services, through a patchwork of grants and other limited funding sources, tends to limit focus on data, especially if Federal funds make up only a portion of resources. Furthermore, Tribes’ capacity to capture and catalogue data can be extremely limited.

[Getting numbers] is still an issue. The data collection, for instance, here in Oklahoma, and I'm sure it's the same everywhere, BIA doesn't have a data collection system. We're working on getting one . . . A lot of those folks . . . have the sophisticated systems that you punch a button and it will tell you everything you need to know. How did we get the numbers to send in? On a piece of paper.

*Dave Johnson, Special Agent in Charge for District,
Bureau of Indian Affairs, Office of Law Enforcement Services
Testimony before the Indian Law and Order Commission, Hearing in Oklahoma City, OK
June 14, 2012*

Issues that have arisen are Tribes may lack the infrastructure to access data through State systems. Indian communities are often not interested in participating in data sharing, seeing it as a tool to arrest Tribal citizens. States like California, (have) only recognized Tribes that had the backing of the Federal government for a pilot program, and New York, which only works with one Tribe, are examples of poor relations in sharing information. Some states such as Washington, Arizona, and Oklahoma allow for Tribal sharing in their fusion centers. Others block it. Tribes do sit on the U.S. borders and deal with security and crime. The National Law Enforcement Telecommunications System (NLETS) is one system that is highly dependent on gaining access from the States. The Federal government was able to grant backdoor access for the FBI's National Crime Information Center.

*Joe LaPorte, Senior Tribal Advisor, Office of the Program Manager, Information Sharing Environment,
Office of the Director of National Intelligence
Written testimony for the Indian Law and Order Commission, Hearing in Oklahoma City, OK
June 14, 2012¹⁶*

Why an Indian country fusion center? We found it's necessary for several reasons: First, the State does not have data or criminal information on our offenders, and second Indian country is viewed by criminal offenders as a lawless gap in the system, because of the jurisdictional issues and the generally low number of police officers working in Indian country. Also Tribal offenders realize that they can travel from one Tribal community to another to hide, commit crime link with other offender's without being concerned about being identified as a criminal offender. Also because of sovereignty and jurisdictional concerns Tribal governments are more likely to participate if the fusion center is specifically, controlled and staffed by officers and personnel from Indian country.

*Edward Reina, retired law enforcement executive and member of the Salt River Pima-Maricopa Community
Written testimony for the Indian Law and Order Commission, Hearing at Salt River Indian Reservation, AZ,
January 13, 2012¹⁷*

Issues regarding who is empowered to collect and report criminal justice data must be resolved. Many States, such as California, generally do not recognize Tribal police as State peace officers. Consequently, as a rule, without special arrangements and the approval of the state Attorney General, Tribal police in California do not have access to the California Criminal Telecommunications System (CLETS) and its National Crime Information System (NCIS) source.¹⁵

Collaboration in data gathering and access. Given the difficulty of finding good data, some justice officers are looking for innovative ways to collect and distribute data.

For instance, the Arizona Counter Terrorism and Information Center (ACTIC) runs the multijurisdictional State fusion center, an “all crimes, all hazards and terrorism information and intelligence center,” that includes several federally recognized Indian Tribes. The Tohono O’odham Nation, for example, is collaborating with ACTIC to create the Tohono O’odham Nation Information Center (TONIC). The long-term goal is to create an Indian country fusion center within ACTIC that is specifically controlled by Native nations. The Inter Tribal Council of Arizona unanimously approved this long-term goal. In testimony before the Commission, law enforcement leaders emphasized the genesis of these efforts to create and expand fusion centers is the lack of data collection and sharing across jurisdictional lines, which offenders exploit.

In 1994, the Inter Tribal Council of Arizona created the Indian Country Intelligence Network (ICIN). ICIN established a forum for a better understanding of various Native nations and government agencies’ roles in Indian country and law enforcement. Partners include the FBI, the U.S. Attorney’s Office for the District of Arizona, and various other Tribal, Federal, and State officials. One example of ICIN’s work involves State agencies that did not follow Tribal extraditing processes for pursuing Indian suspects onto Tribal lands. ICIN created a training video and distributed it to State and local agencies.

Good criminal justice information and appropriate sharing are key to effective criminal justice programs. Even if an offender commits a crime on the reservation and it is documented, it is unlikely other jurisdictions, including other Tribal communities, will be aware of the crime. Conversely, if an offender who lives off reservation commits a crime on the reservation, the Tribal law enforcement would not be able to gain access to information about the offender from State and local authorities. Accurate and shared data would allow greater local control and ability to increase public safety. Criminals will always exploit data gap weaknesses. Many of the gaps can be closed by communicating and collaborating across jurisdictional lines. At the Federal level, the Office of Tribal Justice (OTJ), which was codified as a DOJ component by TLOA, has been involved in a number of efforts to improve the sharing of criminal intelligence and other information to improve public safety in Indian country.

For example, we recently partnered with the Department’s Community Oriented Policing Services (COPS) office and Justice Management Division to provide 17 Tribal police departments with access to the FBI’s National Crime Information Center (NCIC). OTJ provides the moderator for the Tribal Public Safety Network (T-Net) located within the Law Enforcement Online (LEO) secure web portal. OTJ staff also serve on the FBI’s Criminal Justice Information Service Disposition Task Force to explore ways to enhance the inclusion of Tribal court orders and dispositions in national databases.

*Tracy Toulou, Director, Office of Tribal Justice, U.S. Department of Justice
Written Testimony for the Indian Law and Order Commission, Hearing in Arlington, VA
March 8, 2012²⁴*

RECOMMENDATION

These considerations lead to the following recommendation to improve data collection and data sharing:

4.5: Congress should provide specific Edward J. Byrne Memorial Justice Assistance Grants (Byrne grants) or COPS grants for data-sharing ventures to local and State governments, conditioned on the State or local government entering into agreements to provide criminal offenders' history records with federally recognized Indian Tribes with operating law enforcement agencies that request to share data about offenders' criminal records; any local, State, or Tribal entity that fails to comply will be ineligible for COPS and Byrne grants.

CONCLUSION

Even the most basic forms of interjurisdictional cooperation can save money and lives. For example, on the Ute Mountain Ute Reservation in Colorado, the late Chairman Ernest House, Sr. fought back when violence threatened to overwhelm his community. In 2005-06, reported homicide rates on the Ute Mountain Ute Reservation ranged between 250 and 300 per 100,000 people, as compared to a statewide rate of 4 out of 100,000. Stated another way, had the city of Denver experienced the same homicide rates as the Ute Mountain Indian Reservation, Denver would have had more than 1,900 murders instead of the 144 that actually occurred.²⁵

In response, Chairman House convened the Ute Mountain Ute Law Enforcement Working Group, chaired by Gary Hayes, who was then Tribal Council vice chair. The working group met at least monthly to prevent and combat crime. This group quickly gained momentum and began focusing on better coordination across jurisdictional lines. It has since grown to include Federal, State, and local law enforcement, prosecutors, and social services officials from surrounding areas. According to Mr. Hayes, who is now chairman, violent crimes rates have fallen in virtually every major category, and the reservation experienced just one homicide in the past two years. "Working together is saving our people," he said.²⁶

Without question, cooperation works. While the Federal government cannot force people to work together, taking the steps outlined above can help encourage the growing movement among all three sovereigns—Federal, State, and Tribal—to join together for mutual benefit.

ENDNOTES

¹ See Chapter 1 (Jurisdiction: Bringing Clarity Out of Crisis) and Chapter 3 (Strengthening Tribal Justice: Law Enforcement, Prosecution, and Courts) and discussion below in this chapter.

² Tribal Law and Order Act of 2010, § 202. Findings and Purposes.

³ *Id.* at § 222.

⁴ Peace Officer Standards and Training (POST) agencies are generally the principal police training and certification agencies in each state. The International Association of Directors of Law Enforcement Standards and Training (IADLEST) serves as the national forum of POST agencies, boards, and commissions as well as statewide training academies throughout the United States.

⁵ Authority for the issuance of SLECs is based upon 25 U.S.C. § 2804, 25 C.F.R. Part 12, and the Tribal Law and Order Act (P. L. 111-211).

⁶ See Special Law Enforcement Commission Policy (Department of Interior, BIA-OJS) 4-04.

⁷ See Nicholas C. Zaferatos, *Tribal Nations, Local Governments and Regional Pluralism in Washington State: The Swinomish Approach to the Skagit Valley*, 70 J. OF THE AM. PLANNING ASS'N 81 (2004).

⁸ Nicholas C. Zaferatos, *Tribal Planning as Strategic Political Action: A Case Study of the Swinomish Indian Tribal Community* (presented at the Native American Conference Series: American Planning Association National Conference, 1999); BUREAU OF INDIAN AFFAIRS, OFFICE OF JUSTICE SERVICES, CRIME-REDUCTION BEST PRACTICES HANDBOOK: MAKING INDIAN COMMUNITIES SAFE 2012 at 4, 15, 49-57.

⁹ See Hannah Bobee et al., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputization*, Indigenous Law & Policy Center Working Paper 2008-01 (2008) at 18-19, available at www.law.msu.edu/indigenous/papers/2008-01.pdf.

¹⁰ *Id.* at 19.

¹¹ 28 U.S.C. § 1346(b)

¹² Testimony of Carrie Garrow, Hearing of the Indian Law and Order Commission, Nashville TN, July 13, 2012, on file with the Commission.

¹³ Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006).

¹⁴ Todd Minton, *Jails in Indian Country*, 2011 at 2, Bureau of Justice Statistics, U.S. Department of Justice (2012).

¹⁵ For additional information, see Written Testimony of Bill Denke, Hearing of the Indian Law and Order Commission, Agua Caliente Indian Reservation, CA, February 16, 2012, available at <https://www.indianlawandordercommission.com/resources/documents/bd-testimony-inidan-lando-commision-final.pdf>

¹⁶ Available at, <https://www.indianlawandordercommission.com/resources/documents/Joe%20LaPorte%20Testimony%20for%20Indian%20Law%20and%20Order%20Commission%20Public%20Hearing%20June%202014%202012.pdf>

¹⁷ Testimony of Ed Reina, Hearing of the Indian Law and Order Commission, Salt River Indian Reservation, AZ, January 13, 2012, at 2, available at https://www.indianlawandordercommission.com/resources/documents/ILOCFH_PhxAZ_Testimony_EReina.pdf.

¹⁸ Arizona Counter Terrorism and Information Center (ACTIC), Before the Indian Law and Order Commission (written presentation of Michael Orose) (January 13, 2012) at 1, available at https://www.indianlawandordercommission.com/resources/documents/ILOCFH_PhxAZ_Testimony_MOrose.pdf

¹⁹ *Id.*

²⁰ Reina, *supra* note 16.

²¹ *Id.* at 1.

²² *Id.* at 2.

²⁵ *Id.* at 3.

²⁴ Testimony of Tracy Toulou, Hearing of the Indian Law and Order Commission, Arlington, VA, March 8, 2012, at 5, available at https://www.indianlawandordercommission.com/resources/documents/ILOC%20FH_WashDC_Testimony_Toulou.pdf.

²⁵ Electra Draper, *Ute Murder Rate 'A Disgrace,'* THE DENVER POST, February 12, 2007.

²⁶ Interview with Chairman Gary Hayes, University of Colorado Law School, Boulder, April 4, 2013, on file with the Commission.



DETENTION AND ALTERNATIVES: COMING FULL CIRCLE, FROM *Crow Dog* TO TLOA AND VAWA

In August 1881, Crow Dog, a Brule Lakota man, shot and killed Spotted Tail, a fellow member of his Tribe.¹ The matter was settled according to long-standing Lakota custom and tradition, which required Crow Dog to make restitution by giving Spotted Tail's family \$600, eight horses, and a blanket. After a public outcry that the sentence was not harsher, Federal officials charged Crow Dog with murder in a Dakota Territory court. He was found guilty and sentenced to death. The Federal government had never before asserted authority over Indian-versus-Indian criminal justice issues in Indian country, and on appeal, the U.S. Supreme Court affirmed Tribal jurisdiction, noting that the territorial court had inappropriately measured Lakota standards for punishment "by the maxims of the white man's morality."² Members of Congress, outraged by the Supreme Court's ruling, overturned the decision by enacting the Major Crimes Act of 1885, which for the first time extended Federal criminal jurisdiction to a list of felonies committed on reservations by Indians against both Indians and non-Indians.³ In the 130 years since, detention and imprisonment have risen in prominence as responses to crime in Indian country, and Tribal governments have struggled to reassert their views about the value of reparation, restoration, and rehabilitation.

Through the Tribal Law and Order Act of 2010 ("TLOA") and the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments), Tribal governments have regained significant authority over criminal sentencing. If the Indian Law and Order Commission's recommendations

concerning the restoration of Tribal criminal jurisdiction are implemented along with appropriate safeguards to protect defendants' Federal constitutional rights, Tribal governments will have more authority to determine sentences than at any time since the *Crow Dog* days.

Yet, to take full advantage of these current and potential opportunities, Tribes will need to develop the governing system to take responsibility for the serious offenses now handled by State and Federal courts and to do so in a way that fully protects the Federal civil rights of all U.S. citizens. Many Indian nations currently lack this capacity; they make do with detention facilities that are too small, short of funds, understaffed, and without the wrap-around of services that would make more alternative sentencing possible. These challenges to the implementation and exercise of Tribes' reaffirmed rights are detailed below.

The Commission's findings offer hope, as well as financial relief for taxpayers. If Tribes can succeed in reserving detention for the offenders who need it most and in developing alternatives to reduce the demand for jail time, it becomes possible to achieve significant Federal or State cost savings as Tribal governments adopt their own laws and effectively defederalize Tribal justice systems or retrocede them from State jurisdiction where P.L. 83-280 currently applies.

FINDINGS AND CONCLUSIONS: DEFICIENCIES IN DETENTION

Indians who offend in Indian country and are sentenced to serve time may be held in Tribal, Federal, or State facilities. In mid-year 2011, 2,239 self-identified American Indians and Alaska Natives were held in Indian country facilities.⁴ Another 3,500 were in Federal prisons.⁵ Approximately 24,000 American Indians and Alaska Natives are incarcerated in State prisons or detained in county jails; some of these offenders are held for crimes committed in Indian country under the authority the Federal government transferred to States through P.L. 83-280, but that fraction is not publicly reported.

Indian offenders in State and Federal facilities. While there are hardships associated with any incarceration, American Indians and Alaska Natives serving time in State and Federal detention systems experience a particular set of problems. One is disproportionality in criminal sentencing as well as geography. In many cases, this results from State and Federal officials' practical concerns. How, for example, can they supervise an offender from a distance when reservation infrastructure to support house arrest or other forms of community corrections are lacking?

But in other cases, disproportionality arises because Indian offenders are caught up in what is to them a "foreign" justice system: prosecutors, public defenders and defense counsel, judges, and probation officers may be more likely to make inaccurate assumptions about defendants; system processes may not mesh with Indigenous world

views; and myriad opportunities exist for miscommunication. According to extensive testimony to the Commission, these and other factors contribute to a system that is inherently discriminatory, both in terms of how individuals are often treated and in the adverse impacts to Native Americans and Alaska Natives as a group versus other offender categories:

- Research on the 10,800 felony offenders processed by the State of Minnesota (a P.L. 83-280 State) in 2001 concluded that, “For most sentencing decisions, Native Americans are receiving harsher treatment in sentencing decisions at both the ‘front’ [imposition of the sentence] and ‘back’ [fulfillment of the sentence] stages of the criminal justice process.”⁶ In fact, the decision point for early release was the only stage in the process in which Americans Indians were not statistically worse off than Whites. In the year studied, Indians were 16.6 percent more likely to be granted a shortened sentence, although on average, their time already served was longer and their sentence reduction less than that of Whites. As the study authors note, this finding actually affirms system disparities: “The more severe treatment of Native Americans at earlier decision stages subsequently allows for less harsh treatment for Native American offenders at the pronounced length of stay decision.”⁷
- Related analyses indicate that Federal sentencing guidelines systematically subject offenders in Indian country to longer sentences than are typical when the same crimes are committed under State jurisdiction. Extrapolating from a detailed South Dakota dataset, Federal sentences for assault during 2005 were “twenty-five months longer than those for Native Americans sentenced in state court and thirteen months longer than those for whites sentenced by the state.”⁸ While developments in Federal case law since 2005 have created maneuvering room for Federal judges to exercise downward discretion and make Federal sentences for Native Americans more equitable, by 2008 at least, statistics showed that judges were not reducing their sentences for Native American defendants.⁹
- As detailed in the chapter on juvenile justice (Chapter 6), the situation is particularly egregious when Native American juveniles enter the Federal criminal justice system, where parole is unavailable and the opportunities for diversion, wellness, and other incentivized rehabilitation programs are typically nonexistent. As a direct result, these juveniles serve systematically longer terms of incarceration for the same or similar offenses than they would off-reservation.

Another hardship borne by American Indians and Alaska Natives in State and Federal facilities—and their families—is their distance from home. Testimony throughout the Commission’s field hearings emphasized the problems that arise when Tribal members, including juveniles, are detained in far-off facilities. Families must drive long distances or in

Defendants that would otherwise be released to their families and be supervised in their own homes with their children, with their parents, with their grandparents, may have to be detained at a halfway house or in custody many, many miles from their home, or if there is no one in a halfway house, then incarcerated, many times simply because there is no phone and we can't do electronic monitoring. If they had a phone, we could monitor them from their homes as we do anybody else. So sometimes the only difference is that they do not have a phone and we cannot do electronic monitoring, and therefore they are deprived of the opportunity to prove themselves before sentencing.

*Martha Vazquez, Judge, United States District Court, District of New Mexico
Testimony before the Indian Law and Order Commission, Hearing at the Pueblo of Pojoaque, NM
April 19, 2012*

Some of our sister Tribes [in northern Nevada], the counties are charging them something like \$150 a day for bed space. Some counties refuse flat out to accept any Native Americans unless they have been arrested by their county deputies. So . . . we have three, four Tribes that utilize one [BIA] facility in Reno. If they make an arrest, they have to contact the facility to make sure there's bed space, and then they have to contact the BIA detention and make sure that they're able to transport that person. Otherwise they transport them to Duck Valley, which is a 7- to 8-hour drive for some of them.

*Billy A. Bell, Chairman, Fort McDermitt Paiute and Shoshone Tribe,
and President, Inter-Tribal Council of Nevada
Testimony before the Indian Law and Order Commission, Hearing on the Salt River Indian Reservation, AZ
January, 13, 2012*

many cases take commercial airline flights to visit. The Commission is aware of numerous examples of offenders being incarcerated hundreds or even thousands of miles from their family support networks and fellow Tribal citizens. In some instances, the distances involved are practically incomprehensible. The State of Alaska incarcerates Alaska Native inmates in detention centers as far away as the State of New York.¹⁰

Nor is the issue of geographically remote detention services limited to prisons. For instance, in the case of the Oneida Nation of New York local sheriffs' refusal to provide contract jail space resulted in Tribal jail inmates being routinely transported to Pennsylvania and back.¹¹ In such circumstances, a Tribe's ability to exert any influence on an offender's behalf is greatly diminished. In general, culturally relevant support is not available to offenders. Community reentry processes become more difficult and may be ill coordinated.¹² While this problem is more commonly associated with detention under State and Federal jurisdiction, distant placement also can occur under Tribal jurisdiction. For example, Tribes increasingly contract with other governments to house offenders. In this situation, there may be additional community costs, including transportation and removing scarce policing personnel from the community.

Indian country detention facilities. There are three kinds of detention facilities in Indian country: those operated by the Bureau of Indian Affairs (BIA), those operated by Tribal governments under P.L. 93-638 contracts, and those that are fully Tribal facilities, funded and managed by a Tribe itself. These three types of entities are referred to collectively as "Tribal jails." As one long-time analyst of Tribal criminal justice systems notes, "The expansion of Tribal sovereignty and the safety of Indian communities are critical priorities for Tribal governments, and an essential element of each is the detention and rehabilitation of criminal perpetrators."¹⁵

According to the U.S. Department of Justice (DOJ), 79 Tribal jails served Indian country in 2012.¹⁴ Among these, there are an increasing number of exemplary facilities that serve as anchors along a continuum of care from corrections to community reentry and that are able to connect detainees with core rehabilitation services, such as substance abuse treatment, mental health care, cultural programming, and education. For many Tribes, financial assistance from the U.S. government for facility planning, renovation, expansion, staffing, and operations have been important in these efforts. Funding has included \$225 million in economic stimulus funds for Tribal correctional facility construction.¹⁵ Among the 79 jails serving Indian country in 2012, 21 are new since 2004.¹⁶

On the other hand, 11 Tribal detention facilities permanently closed between 2004 and 2012.¹⁷ In most cases, deficiencies in funding, staff, and appropriate space proved their undoing. The Indian Law and Order Commission has found these specific issues to be of continuing concern for many other jails in Indian country.¹⁸ One such jail that has

Salt River Department of Corrections is one of a growing number of exemplary detention centers in Indian country. Designers of this purposefully built facility, which opened in 2007, did not just focus on meeting the standards necessary for housing a variety of offenders. They also consciously included elements that reflect culture and support rehabilitation. Reentry is a key focus for the corrections center, and it offers classes ranging from basic life skills to vocational certification as a food handler. But the center's programming also focuses on the very human side of reentry, helping keep families together even when a loved one is in jail. For example, through the Storybook Project, incarcerated parents can record themselves reading a children's book, and the book and recording are sent to the child. This innovative spirit has served juvenile offenders well, too: Salt River is the first corrections facility in Indian county to host a full Boys and Girls Club. The partnership was recognized with a Merit Award from the Boys and Girls Clubs of America in 2012.²⁰

BIA officials told us that they need to know which Tribes DOJ plans to award grants to construct correctional facilities at least 2 years in advance so that they can plan their budget and operational plans accordingly in order to fulfill their obligation to staff, operate, and maintain detention facilities. According to BIA, there have been instances where they were unaware of DOJ's plans to award grant funds to Tribes to construct Tribal detention facilities, which could result in new facilities remaining vacant until BIA is able to secure funding to operate the facility.

DOJ has implemented a process whereby when Tribes apply for DOJ grants to construct correctional facilities, DOJ consults BIA about each applicant's needs as BIA typically has first-hand knowledge about Tribes' needs for a correctional facility and whether the Tribe has the infrastructure to support a correctional facility, among other things. BIA then prioritizes the list of applicants based on its knowledge of the detention needs of the Tribes. DOJ officials noted that the decision about which Tribes to award grants to rests solely with them; however, they do weigh BIA's input about the Tribes' needs for and capacity to utilize a correctional facility when making grant award decisions. To help BIA anticipate future operations and maintenance costs for new Tribal correctional facilities, each year DOJ's Bureau of Justice Assistance (BJA) provides BIA with a list of planned correctional facilities that includes the site location, size, and completion date. BIA officials noted that this level of coordination with DOJ is an improvement over past years as it helps to facilitate planning and ensure they are prepared to assume responsibility to staff, operate, and maintain Tribal detention facilities.

United States Governmental Accountability Office, "Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts," 2011

since been closed was the former Office of Justice Services (OJS) Adult Detention Center on the Rosebud Sioux Nation in South Dakota, which the Commission visited in May 2012. At that time, as many as six inmates were incarcerated in cells designed for one person. The living conditions were so deplorable that no more than two of the six inmates could stand in the cells at any given moment; the rest had to lie or sit on their bunks.¹⁹ Looking to the future, these and related issues will challenge the effective use of Tribal detention resources.

Funding for New Jails. Tribal governments must solicit funding from DOJ to pay for construction costs and from the U.S. Department of the Interior (DOI) to pay operation and maintenance costs. While the Departments are striving to improve their collaboration, this has proven bureaucratically difficult, and Tribes continue to bear primary responsibility for managing coordination, sometimes without success. As stressed in Chapter 3, these Federal departments' overlapping responsibilities are problematic and justify the Commission's recommendation for consolidating Federal programming for Indian country criminal justice within a single executive branch agency.

Funding for Operations. Appropriate funding for Tribal jail operations is difficult to estimate. Because many are in rural or remote locations, Tribal jails' staffing and day-to-day operating costs tend to be higher than for their non-Tribal counterparts. Because of the "thinness" of the overall institutional and service provision environments in which most operate, Tribal jails may need to provide more services, at greater cost, than non-Tribal jails. These facilities serve at least three distinct purposes: pretrial detention, short-term incarceration for nonviolent offenders, and longer term incarceration for violent offenders. The facilities must serve multiple populations: men and women, and sometimes both adults and juveniles. At least two of these purposes are associated with higher detention costs: pretrial detainees' short stays drive up administrative processing costs, and more violent offenders require higher, more costly security. Thus, it is difficult to identify appropriate facilities for cost comparisons. Using average daily census as the basis for per prisoner cost comparison, Tribal jails operate with fewer resources than one-quarter of State prison systems. Maine, Minnesota, North Dakota, Washington, and California (States with significant Native populations), are all part of this upper quartile. Tribal jails that operate closer to their rated inmate capacity fare much worse. They must fulfill their many functions with resources comparable to those available to a rural county lock-up or a Federal low-security prison.

Overcrowding. In both 2011 and 2012, one out of five Indian country jails operated at 150 percent of their rated capacity on their most crowded days. For at least six of these jails, adequate space may be a more constant concern, as they reported overcrowded conditions not only on peak days, but also on randomly sampled dates.²¹ When coupled with low staffing levels, overcrowding results in less supervision, restrictions on offender privileges (such as time outside), and less access to rehabilitation services.

A \$2 million American Indian detention center for youth offenders remains empty and nonfunctioning five years after it was built using Justice Department grants, the Star Tribune of Minneapolis-St. Paul reported Sunday. The center was finished in 2005 and the Red Lake Band of Chippewa, Minnesota's most cash-strapped Tribe, expected the Federal Bureau of Indian Affairs to request more than \$1 million a year to help run the 13,000-square-foot, 24-bed facility. But the BIA never requested the funding and the Tribe said it does not have the money to operate the center. The Tribe has now hired lawyers to take the Federal government to court. The plight of the Red Lake Band has caught the attention of Sen. Al Franken (D-Minn.) and has frustrated former Minnesota U.S. Attorney Tom Heffelfinger. Heffelfinger told the Star Tribune that the delay on opening the facility is "ridiculous." "Just putting the bricks and mortar up and then walking away doesn't solve the problem," Heffelfinger told the newspaper.

*Eric Roper, "Red Lake Lockup Sits Locked Up and Empty," Star Tribune
March 21, 2010*

Table 5.1 Annual per Inmate Cost, FY 2010

Facility Types	Amount
Federal minimum security prison ^a	\$21,005
Average across rural Pennsylvania jails ^b	\$25,185
Federal low security prison ^a	\$25,377
Tribal jails, based on rated capacity^c	\$25,562
Federal medium security prison ^a	\$26,248
Average across federal facilities ^a	\$28,282
Average across state prisons—DOJ BJS estimate ^d	\$28,323
Average across state prisons—Vera Institute estimate ^e	\$31,286
90th percentile rural Pennsylvania jail cost ^b	\$32,850
Federal high security prison ^a	\$33,858
Tribal jails, based on average daily census^c	\$37,548
75th percentile state prisons—DOJ BJS estimate ^d	\$40,175
75th percentile state prisons—Vera Institute estimate ^e	\$48,826

Notes: 1. County jail costs vary significantly based on size, location, and services offered. A recent study of Pennsylvania’s rural county jails is one of the few available that provides an example of this variation. 2. State prison costs estimated by DOJ are lower than those estimated by the Vera Institute, a nonprofit group that tracks prison costs. Vera Institute’s numbers attempt to account for all spending by State prison systems even if it originates outside a State’s corrections budget.

Sources: a. Nathan James, *The Federal Prison Population Build Up: Overview, Policy Changes, Issues, and Options*, Congressional Research Service 15 (2013), <http://www.fas.org/sgp/crs/misc/R42937.pdf>.

b. Gary Zajac & Lindsay Kowalski, *An Examination of Pennsylvania Rural County Jails 14*, The Center for Rural Pennsylvania (December 2012) (“The system-wide average cost-per-day, per-inmate was \$60.41 during the study period (2004-2010).”),

http://www.rural.palegislature.us/documents/reports/rural_county_jails_2012.pdf.

c. *Activities, Subactivities, Program Element, Subelements, Operation of Indian Programs, Enacted Budgets for the Bureau of Indian Affairs*, DOI (2013), on file with the Commission; Todd Minton, *Jails in Indian Country, 2011* at 2, Bureau of Justice Statistics, DOJ (2012),

<http://www.bjs.gov/content/pub/pdf/jic12.pdf>.

d. Tracey Kyckelhan, *State Corrections Expenditures, FY 1982-2010* at 4, T.2, USDOJ, Bureau of Justice Statistics, Office of Justice Programs, <http://www.bjs.gov/content/pub/pdf/scefy8210.pdf>.

e. Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers* 10, fig. 4 (showing average cost by state), Vera Institute of Justice (January 2012, updated 7/20/12),

http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf.

Pilot BOP Prison-Sharing Program. TLOA allows for Native nations to contract with BOP to incarcerate at the closest and most appropriate facility those offenders who are violent and have served at least two years of their sentence. At any time Tribes can choose to withdraw their prisoner. The Federal government covers the cost. The BOP will take up to 100 Tribal prisoners from across the United States. The first Indian Tribe to make use of the BOP program was the Confederated Tribes of the Umatilla Indian Reservation. The Tribal court sentenced an offender to 27 months for assault, with the sentence to be served in a BOP facility. By applying to send the offender to Federal prison under TLOA, the Tribe avoided spending the approximately \$50 a day for the Tribe to utilize the Umatilla County Jail. Appropriate paper work and approval by the BOP were needed to ensure entry into the program.²⁸

The Leech Lake Band of Ojibwe Joint Jurisdiction Wellness Court: An Example of Tribal Alternatives to Detention. In the mid-2000s, both Leech Lake Band of Ojibwe and Cass County, MN were faced with high rates of drunk driving, recidivism, and little money. In 2006, Cass County approached the Tribe about collaborating through a joint powers agreement to create a DWI court. Historical tensions between the Tribe and the county made it easy to think of “a million and excuses why it won’t work.” However, they had the common goal to lower the recidivism rate of impaired driving. Finally, both sides collaborated on how the DWI court would look and function and, in 2006, the Leech Lake-Cass County Joint Jurisdictional Court began operations.

The collaboration, which combines the jurisdiction of the Tribe with the federally transferred jurisdiction the State exercises under P.L. 83-280, has been a success. Judges from the Tribe and county preside over the court together, which creates trust between the Tribe and county. Using drug court and wellness court principles, the program provides holistic, culturally relevant services that address the sources of offenders’ problems rather than simply the symptoms. Besides the court judges, Tribal and county law enforcement, and Tribal and county service providers participate in the court’s programming, which is overseen by the county’s probation office. By 2012, the recidivism rate among offenders processed through the joint jurisdictional court reach only 4 percent, a marked decrease from the rates of 60-70 percent that had prevailed before the court came into operation. However, the most telling sign of success is the change in attitude of the community. For example, there is a growing community of people who are choosing to be sober or who are reaching out when they need help instead of reoffending.³⁸

Understaffing. In 2004, the DOI Office of the Inspector General released the report “Neither Safe nor Secure: An Assessment of Indian Detention Facilities,” which documented deficiencies in Indian country jails’ safety, security, staffing, staff training, funding, maintenance, space, and policies and procedures.²²

In a 2011 follow-up report, the Inspector General noted that these staffing shortages had not been addressed. DOJ survey data back up this finding: “Overall, the ratio of inmates to jail operations employees was 2.1 inmates to 1 jail operations employee at midyear 2012, up from 1.8 to 1 in 2011, and down from 2.5 to 1 in 2004.”²³ Yet, Tribal detention facility staffing is a difficult problem to resolve. BIA had invested nearly \$1 million in recruitment efforts in the intervening years, an effort that had limited results and ended in a recruitment firm’s contract termination. But the Inspector General also noted that BIA’s financial management and tracking tools, which should be an aid to Tribes in changing practice and marking progress, “do not provide the necessary management information to address funding and staffing concerns.”²⁴

Poor Physical Conditions. Reiterating its 2004 report, the DOI Inspector General’s 2011 report notes:

“Not only are BIA facilities understaffed, but the physical conditions of the buildings also need improvement. We consider more than half of the [eight] detention facilities we visited to be in unsatisfactory or poor condition. We observed leaky roofs; defective heating, fire safety, and security systems; non-detention grade doors, windows, and fencing; rust-stained sinks, toilets, and showers; and an overall lack of cleanliness.”²⁵

Violent Offenders. The number of violent offenders in Indian country detention facilities has fallen slightly from a peak of 41 percent of the inmate population in 2007 to 32 percent in 2012.²⁶ However, with new authorities available to Tribes under TLOA and the VAWA Amendments (providing Tribes the opportunity, under Tribal law, to incarcerate violent offenders and non-Indian offenders convicted of domestic violence or sexual assault for up to 9 years), these numbers are expected to rise. Given that pretrial detainees always will compose a significant segment of the Tribal jail population,²⁷ adjusting the use of resources to provide appropriate quarters for various classes of offenders is of increasing importance. Jails and prisons are two very different kinds of institutions.

Jails are designed for short-term detainees (violent offenders, pretrial, and nonviolent offenders), and generally do not provide many services. Prisons are for longer-term detainees, and are prepared to make longer term “investments” in them. If Tribes are going to have to house violent offenders for longer periods, different kinds of detention facilities will be needed. One important option for Tribal governments may be the development intertribal, regional facilities for longer-term, more violent

Tulalip Tribes Alternative Sentencing Program. Twenty years ago, the Tulalip Tribes confronted growing crime, violence, and drug use problems on their lands and among their citizens. Located along the I-5 corridor 40 miles north of Seattle, WA, the Native nation experienced all the advantages and disadvantages of its location. It was able to develop a highly successful gaming enterprise, but its lands had become an attractive locale for drug dealing.

The Tulalip Tribes' solution was to take control of criminal justice in the community. Because it was subject to P.L. 83-280, which creates concurrent State and Tribal jurisdiction on reservation land, the Tribe's first step was to advocate for retrocession—or the transfer of criminal jurisdiction from the State to the Federal government. After the transfer, the Tribal government was free to develop justice programming without State interference.

Today, rather than sentencing offenders to jail, the Tulalip Tribes' alternative sentencing program requires offenders to address the underlying issues that brought them to court in the first place. A multitude of agencies provide services and support and meet to hold offenders accountable. Programs that may be part of an offender's sentence include: substance abuse treatment, mental health treatment, anger and stress management, community service, random drug testing, meetings with elders, vocational classes, life skills and parenting classes, job search support, and family reunification. The court relies on GPS-enabled ankle bracelets to monitor and restrict offenders' activities and uses brief jail stays as a last resort. Recidivism in the program is approximately 20 percent lower than the county benchmark, and compared to its spending under the previous system, the Tribe saves approximately \$100,000 annually in jail-use fees.⁵⁹

detainees. In the meantime, the Federal Bureau of Prisons' (BOP) pilot project authorized by TLOA already has been of use to Tribes working to adjust to these renewed authorities.

FINDINGS AND CONCLUSIONS: OPPORTUNITIES IN ALTERNATIVES

“Alternatives to incarceration” or “alternatives to detention” are programs to which a judge may send criminal offenders instead of sentencing them to jail. Alternative sentencing aims to create pathways away from recidivism by addressing the core problems that lead offenders to crime, which may include substance abuse, mental health problems, and limited job market skills, and by helping them develop new behaviors, such as anger management, job skills, among others that support the choice to not commit crimes. Jail may still be part of an offender’s experience with an alternative sentence, but it would be used sparingly and as a short-term measure, functioning as a component in a more comprehensive program involving intensive supervision, coordinated service provision, and high expectations for offender accountability.

A considerable amount of data demonstrates the effectiveness of some alternatives to detention across a wide range of court settings and offense categories. From New York City’s mainstream courts to Bethel, Alaska’s Tribal forums and for offenses along the spectrum from misdemeanor to felony, meta-analysis shows that participants in alternative programs reoffend at rates at least 10-20 percent lower than non-participants.²⁹ There also is growing evidence that other positive life outcomes—holding a job, getting an education, reuniting with children, enjoying better health, among others—are associated with participation in alternative programs, especially those with a substance abuse treatment component.³⁰ This is not to say that alternative sentences are proven to be effective in all cases, but rather that such approaches suggest the possibility of substantial cost savings in many instances.

Effectiveness translates to cost-savings. Taxpayers can save money when nonviolent offenders are diverted from jail into alternative programs. Counties and Tribes that lease jail space from other jurisdictions notice immediate savings; governments that manage their own jail facilities gain savings as decreased demand decreases operating costs.

As recidivism falls, jurisdictions save even more money as they make fewer arrests, adjudicate fewer cases, and further decrease the use of jail and prison facilities.³¹ For example, California estimates that its alternatives to detention programs save State taxpayers \$90 million a year.³² San Bernalillo County, NM found that in the 6 years following its implementation of alternatives to detention for juveniles, there was a decrease in every offense category tracked, and State taxpayers realized over \$4.7 million in cost savings.³³ Broad-based research by the Pew

At Lummi we know that incarceration makes better criminals, not healthier people. We do recognize that sometimes there is no alternative to incarceration to protect vulnerable members of our community. However, incarceration is rarely the best method to help anyone—especially our Tribal people—to function in a healthy manner in our communities when they are released. We have learned the hard way that for successful reentry into our communities, our people need a comprehensive continuum of care that includes addiction treatment, job-related education and training, housing, and employment supported by traditional ceremony, language, and spirituality.

*Ron Tso, Chief of Police, Lummi Nation
Testimony before the Indian Law and Order Commission, Hearing on Tulalip Indian Reservation, WA
September 7, 2011*

I was a prosecutor for a long time. There are some people that need to be locked up. But there's also a need for some alternatives to incarceration—modern facilities that have either electronic home monitoring, work release, healing programs—especially in Indian Country; some ways that some of these offenders, especially the youthful offenders, can come back to the Tribe, whether it's the use of a sweat lodge, whether it's the use of an elders council, or a peacemaker court. These are important alternatives I think that have to be included in any corrections model.

*Philip Harju, Tribal Attorney, Cowlitz Indian Tribe,
Testimony before the Indian Law and Order Commission, Hearing in Portland, OR
November 2, 2011*

I think what really needs to be done in a larger focus is to look at the prevention efforts. Ninety-seven percent of our calls are for domestic violence and drunken driving. And they're not bad people; they just have a bad habit. And I really feel that once we beef up our efforts on that—that side will go a long ways in Indian Country.

*Ivan Posey, Chairman, Chairman, Eastern Shoshone Tribe on the Wind River Indian Reservation
Testimony before the Indian Law and Order Commission, Hearing on Rosebud Indian Reservation, SD
May 16, 2012*

Charitable Trusts demonstrates that alternatives as basic as probation and parole rule changes generate substantial cost savings.⁵⁴ The Annie E. Casey Foundation, which has helped design and evaluate alternatives to detention for juveniles across the United States (including the San Bernalillo County program), has concluded that incarceration can be comparatively wasteful of taxpayers' money in many cases.⁵⁵

Numerous witnesses at the Commission's field hearings expressed a desire for greater use of alternatives to detention in Indian country. This finding echoes feedback provided to the Departments of Justice and the Interior in government-to-government consultations concerning the Departments' implementation of TLOA. In fact, the leading conclusion from the consultations is that "Alternatives to incarceration (which could include treatment) should be the paramount objective in any plan to address the corrections aspect of public safety in Tribal nations. Detention of Tribal members should be a rare exception in the corrections context, where many of the offenders are suffering the effects of poverty, isolation and substance abuse."⁵⁶

From the Tribal standpoint, this finding is neither surprising nor new. Tribes are long-time advocates for alternative approaches. It is difficult to find a policy paper, research study, or evaluation report from the past 20 years that addresses Indian country corrections that does not call for more alternatives to detention. In part, the emphasis reflects the strong similarity between alternative sentencing and Tribes' traditional approaches to justice—which, echoing the *Crow Dog* case from long ago, focus on making reparations, healing victims and offenders, and restoring community.

But the Tribal orientation is more than "cultural correctness." It also reflects the evidence (gathered through lived experience prior to *Crow Dog* and through more academic methods in the modern era) that alternatives are more effective than purely punitive measures. They are better able to address the fundamental causes of crime and violence. Today, alcohol and drug addiction is associated with much of the misery and crime in Indian country. Looking deeper still, America's historical Indian policies, which focused on colonial domination and dispossession, have led to economic, social, and political marginalization within once healthy and self-sustaining Indian nations. The conditions of marginalization have given rise to accumulated feelings of powerlessness, hopelessness, and lack of personal value—that, in turn, lead to substance abuse, anger, and violence. Unless justice responses address these addiction and mental health concerns, little true progress can be made against Indian country crime.⁵⁷

The Commission concludes that creating and maintaining fair, restorative, culturally compatible, and community healing justice institutions is a primary goal of many Indian nations. Without the option to build culturally acceptable Tribal justice institutions that are directly accessible and accountable to local citizens, Tribal community members

Mike was an individual who I had the opportunity to come across when I was Chief of Police on the Crow Reservation. Mike was not a criminal, but he had an alcohol and substance abuse problem that caused him to what I call “do a life sentence two weeks at a time” in Indian country jails. We would get called because he would be intoxicated. We would go; we would bring him to the detention center. We would book him in, and we could have sent him over to the Tribal court Monday. He would have been fine by himself just to walk over there. That’s who he was when he was not intoxicated. And the judge would then put him back into our facility for two weeks, and while he was in there he was great. He would come, work, clean and vacuum and was just a model human being—not [just] a model inmate—but a model human being, a person you liked to be around. But then he would get out because we didn’t provide programs to address his addictions . . . and then shortly thereafter he would be back in that same cycle . . . I was happy to hear there’s a happy ending to that story, to his story. I didn’t do anything to help him at the time. I could have, but that’s not what I was thinking at the time. But somebody got to him, and now he is actually working at the Seven Hills Treatment Center on the Crow Indian Reservation in its substance abuse program, not as a counselor, but as a custodian, kind of a maintenance man there. I got an opportunity to talk to him not too long ago, and he was so proud to tell me that he has been sober for all those months and is doing good If Mike can do it, anybody can do it. So we want to get out of the business of warehousing our people, and [start] looking at alternatives to sentencing, treatment, rehabilitation, those types of efforts.

*Darren Cruzan, Director, BIA-OJS,
Testimony before the Indian Law and Order Commission, Hearing in Arlington, VA
March 7, 2012*

will consider their Tribal governments as failures and will tend not to freely collaborate. Associated Federal- and State-managed justice systems will frequently be seen by many Tribal members as coercive, discriminatory, and self-serving. Tribal economic and political development will be seriously impaired, resulting in continued social distress, resistance, and alienation.

In making these recommendations, the Commission stresses that many crimes will and should remain within the Federal and State adversarial court system. However, many lesser crimes and civil matters can be managed by alternative methods. By way of illustration, the Navajo Nation has a peacemaker court, limited to non-lawyers and based on community mediation by a court-certified lay peacemaker, on whom Navajo District Court judges often rely in determining criminal sentencing. Such approaches have worked well for decades, if not centuries, and hold tremendous promise for adjudicating more disputes at less cost and for determining sentences where, based on community norms and mores, the punishment fits the crime.

Yet, the call for more alternatives to detention programs in Indian country also proves there are too few. The Indian Law and Order Commission heard testimony about exemplary programs, including the Leech Lake Band of Ojibwe Joint Jurisdiction Wellness Court and Tulalip Tribes Alternative Sentencing Program. Why are there not even more? And why are the extant programs threatened?

A review of many successful programs inside and outside Indian country points to the reasons. Positive outcomes from alternatives to detention programs depend on having:

- judges or other sentencing decision makers who are well-informed about sentencing options;
- a legal code that supports alternative sentencing and does not, by default, create a “jail only” option;
- screening mechanisms that appropriately select individuals into alternative programs and to divert offenders with similar criminal histories into the same supervision groups;
- a strong probation or community oversight unit that is able to manage the alternatives program; and
- access to the array of services that will help equip the offender to navigate the pathway away from recidivism.⁴⁰

Testimony and other data available to the Commission indicate that at present, only some Tribes are in a position to achieve success. But with targeted assistance and relief from Federal command-and-control policies, additional advancement can proceed exponentially.

For some of the problems that we have that need resolving, alternative sentencing is really a good thing. I don't see incarceration as being the answer to our problems. We have many people who come through our jails, they have a high recidivism rate, but there is little to no programming outside of detention.

*Miskoo Petite, staff member, Rosebud Sioux Tribe Juvenile Detention Center
Testimony before the Indian Law and Order Commission, Hearing at Rosebud Indian Reservation, SD
May 16, 2012*

They have to classify the kids and the problems to fit into the Federal programs they have. That can be dealt with [by] interagency funding and coordination. But whenever I talk about that people roll their eyes, "Oh, yeah, well it's human nature not to coordinate."

*Sam Deloria, Director, American Indian Graduate Center
Testimony before the Indian Law and Order Commission, Hearing at Santa Ana Pueblo, NM
December 14, 2011*

Most of the wheels of justice actually occur outside of the courtroom. A sovereign must bear the burden of ensuring that all of these various systems are operational. For many Tribal governments tremendous financial barriers stand in the way of implementing justice.

*Montie Deer, Vice Chief Judge, Muscogee Creek Nation
Testimony before the Indian Law and Order Commission, Hearing in Oklahoma City, OK
June 14, 2012*

It is important that we not be an island unto ourselves. If Annie Casey (Foundation) didn't teach us anything else, that stakeholders, all the stakeholders needed to be at the table. We were co-equal; we needed to be heard; we needed to give our input if it was going to be a meaningful collaboration And some of the very important and, maybe indispensable, stakeholders are our community partners.

*John Romero, Judge, Bernalillo County Children's Court and Participant,
Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative
Testimony before the Indian Law and Order Commission, Hearing at Santa Ana Pueblo, NM
December 14, 2011*

- **Trained Sentencing Decision Makers.** Over the last 15 years, numerous Tribal court staff have been trained in the development and management of Tribal “Healing to Wellness” courts, and in 2011, 79 Tribes reported having such forums.⁴¹ These courts “bring together community-healing resources with the Tribal justice process, using a team approach to achieve the physical and spiritual healing of the participant and the well-being of the community.”⁴² This description is quite general, yet because Healing to Wellness courts began as drug courts, even the Tribes that have them may be unprepared to offer alternatives to detention to defendants with other offense profiles. Fortunately, infrastructure and some content already exist for training, much of which was created with support from the DOJ.⁴⁵
- **Supportive Legal Codes.** Data from the 2002 survey of Tribal justice agencies show that nearly 200 Tribes provided some intermediate sanctions (sentences that do not involve detention) against adults for criminal violations in Indian country⁴⁴—an indicator of the number of Tribes whose legal codes may provide for alternative sentencing. For Tribes whose law and order codes do not specify sentencing options other than fines and jail time, the opportunity to implement law-backed detention alternatives is limited.
- **Screening Mechanisms.** “A Desktop Guide for Tribal Probation Personnel: The Screening and Assessment Process,” published in 2011 with support from BJA, provides risk evaluation assistance for Tribal sentencing decision-makers. Such information is valuable; nonetheless, if a Tribe does not have its own screening protocol for diversion or staff who know how to use the protocol, it will not have provided the best opportunity for offender success.
- **Probation Programs.** The best available information suggests that many Tribes do not have probation offices: data from the 2002 survey of Tribal justice agencies show that a decade ago, only 41 percent of the 315 responding Tribes operated probation programs.⁴⁵ While the numbers surely have risen since, many of these offices are grant-funded and require more financial stability to ensure consistent offender supervision, let alone the option for community-based supervision.
- **Appropriate Services.** In 2011, most Indian country jails had difficulty providing more than a few services (Table 5.2), indicating that it may be equally difficult for Tribes to provide services to offenders supervised in the community. The absence of collaboration across Tribal programs further impedes service provision. Because many of the services needed to assist offenders are not available through OJS or DOJ programs, probation officers must coordinate with providers funded by the Indian Health Service, Bureau of Indian Education, the Substance Abuse and Mental Health

Services Administration (SAMHSA), and others to ensure access for their clients. Moreover, service provision alone is inadequate to support effective alternatives to detention; it also must be coordinated and managed in a way that marks offenders' progress, meets their multiple needs, sanctions slippage, and provides praise for forward momentum.

That lawmakers have sometimes been more interested in expanding jail and prison space than in alternatives to incarceration is yet another challenge. But two recent trends provide counter balance. For one, State governments are increasingly interested in the cost savings achievable through alternatives to detention.⁴⁶ In P.L. 83-280 States, this shift may provide new opportunities for Tribal governments to collaborate with States on community supervision partnerships. It may also help Native defendants in State systems retain cultural, community, and family ties that might support their rehabilitation and recovery in some cases.

Table 5.2 Service Provision by Tribal Jails, 2011

Service or program	% of facilities* offering services or program
Mental health services	93%
Drug dependency counseling/awareness	84%
Alcohol dependency counseling/awareness	80%
Spiritual counseling	75%
Domestic violence counseling	54%
GED classes	49%
Parenting skills	48%
Basic and high school classes	43%
Life skills & community adjustment programs	35%
Sex offender treatment	12%

* Not all facilities responded to this question; base is between 68 and 75 reporting facilities (of 80 total facilities overall in 2011).

Source: Todd Minton, Jails in Indian Country, 2011 at Tables 11 and 12, Bureau of Justice Statistics, DOJ (2012), <http://www.bjs.gov/content/pub/pdf/jic12.pdf>

Second, reentry programming—or the management of a nonviolent offender’s transition out of detention and back into the community—has become a significant focus for the Federal government.⁴⁷ The context of reentry programming is post-detention, but its emphasis on offender recovery and restoration, reduced recidivism, and community safety are the same as alternatives to detention programming.⁴⁸ As a result, investment in reentry may raise the profile of alternatives to detention in Indian country and create new opportunities to pursue them.

RECOMMENDATIONS

Based on testimony and its study of the current status of detention and alternatives to detention in Indian country, the Commission makes four recommendations. In nearly every case, they may be understood as detention-specific versions of the broader recommendations on Tribal jurisdiction, justice funding, and intergovernmental collaboration offered elsewhere in this report.

The recommendations also reflect the Commission’s findings concerning the impact and cost-effectiveness of incarceration as compared to alternatives to detention. As Tribes strive to create more self-determined corrections systems, where community safety permits, the Commission encourages a shift away from detention-centered programming, toward more alternatives to detention, more rehabilitation and restoration programs, and more supportive reentry processes. To date, many Tribes have viewed construction of a local jail as a positive for Tribal self-determination and effective crime fighting, and rightly so. But, in planning for the future, Tribes should also be encouraged to ask how Tribal corrections resources can be most effectively spent and whether there are other options for the use and location of detention facilities.

5.1: Congress should set aside a commensurate portion of the resources (funding, technical assistance, training, etc.) it is investing in reentry, second-chance, and alternatives to incarceration monies for Indian country; and in the same way it does for State governments, to help ensure that Tribal government funding for these purposes is ongoing. In line with the Commission’s overarching recommendation on funding for Tribal justice, these resources should be managed by the recommended Indian country unit in the Department of Justice and administered using a base funding model. Tribes are specifically encouraged to develop and enhance drug courts, wellness courts, residential treatment programs, combined substance abuse treatment-mental health care programs, electronic monitoring programs, veterans’ courts, clean and sober housing facilities, halfway houses, and other diversion and reentry options, and to develop data that further inform the prioritization of alternatives to detention.

DOJ announced a commitment of more than \$58 million to second-chance and reentry programs in 2013. SAMHSA also declared

the availability of \$12.9 million for offender reentry programs. Especially in response to the Affordable Care Act, the Centers for Medicare and Medicaid Services (CMS) are working to improve access to healthcare during the reentry process. Besides SAMHSA and CMS, other units within the U.S. Department of Health and Human Services have commitments to reentry programming. The U.S. Department of Veterans Affairs also provides funding for reentry through its Health Care for Re-entry Veterans Program.⁴⁹ Other funds are available from these and other Federal agencies for the management of alternatives to detention.

The Federal government is committing significant resources to reentry, second-chance, and alternatives to detention programming of which Indian country should receive a commensurate share. Rather than administering these funds in a piece-meal fashion from these many agencies, funds for Indian country should be carved out of each program, consolidated, and managed from a single, tribally focused agency in DOJ. This guarantees funding to Tribes, reduces administrative overhead, and allows greatest flexibility and effectiveness in American Indian programming.

5.2: Congress should amend the Major Crimes Act, General Crimes Act, and P.L. 83-280 to require both Federal and State courts exercising transferred Federal jurisdiction 1) to inform the relevant Tribal government when a Tribal citizen is convicted for a crime in Indian country, 2) to collaborate, if the Tribal government so chooses, in choices involving corrections placement or community supervision, and 3) to inform the Tribal government when that offender is slated for return to the community.

This recommendation is a detention-specific version of the recommendations for increased intergovernmental collaboration made elsewhere in this report. Tribal, State, and Federal governments should collaborate to ensure that Tribal governments are knowledgeable about: (1) which of its citizens are in the custody of non-Tribal governments; (2) that each offender's Tribal government has the option to be engaged in decision making regarding corrections placement and supervision; and (3) that the nation is informed about and prepared for the offender's eventual reentry to the Tribal community. This information helps increase Tribal citizens' access to alternatives to detention across a variety of jurisdictional arrangements.

5.3: Recognizing that several Federal programs support the construction, operation, and maintenance of jails, prisons, and other corrections programs that serve offenders convicted under Tribal law, appropriate portions of these funds should be set aside for Tribal governments and administered by a single component of the U.S. Department of Justice. This includes any funds specifically intended for Tribal jails and other Tribal corrections programs (e.g., those available through the Bureau of Indian Affairs) and a commensurate

Tribal share of all other corrections funding provided by the Federal government (e.g., Bureau of Prisons funding and Edward J. Byrne Memorial Justice Assistance Grants/JAG program funding). To the extent that alternatives to detention eventually reduce necessary prison and jail time for Tribal-citizen offenders, savings should be reinvested in Indian country corrections programs and not be used as a justification for decreased funding.

The Commission has two major concerns with regard to funding for Indian country corrections. The first is that Tribes must receive a fair share of funds available at the Federal level for corrections systems creation and operation. While some corrections funds are specifically designated for Tribes, most are allocated in a manner that privileges State and local governments above Tribal governments. New approaches to funding should ensure that Tribes are treated equally in the allocation of resources.

The Commission's second concern is that savings realized through the creation and increased use of alternatives to detention should not be lost to Tribal governments, which is the case today. Instead, funding should follow each individual offender, so that if an offender's time served is reduced, money that would have been spent on detention is then available for service provision. In the event that the detailed accounting needed to enable such a system proves to be impractical, some scaled-down or simplified version of this "follow the offender" system would still be worthwhile to make the Federal government accountable about the real-dollar value of its investments in Indian country justice programming. Success with alternatives to detention should allow a reprioritization of spending without reducing the pool of money available to Indian country. Similarly, any given Tribe should realize savings it generates through community supervision and reductions in recidivism.

5.4: Given that even with a renewed focus on alternatives to incarceration, Tribes will continue to have a need for detention space,

a) Congress and the U.S. Department of Justice should provide incentives for the development of high-quality regional Indian country detention facilities, capable of housing offenders in need of higher security and providing programming beyond "warehousing," by prioritizing these facilities in their funding authorization and investment decisions; and,

b) Congress should convert the Bureau of Prisons pilot program created by the Tribal Law and Order Act into a permanent programmatic option that Tribes can use to house prisoners.

While the thrust of the overall recommendations in this report is that Tribes should have the freedom to decide how justice monies are used in their communities, the Commission believes that the creation of incentives for regional Indian country detention centers will lead to higher-

quality facilities and more effective in-facility programming. While this approach would mean that some prisoners are housed farther from their home communities than may be ideal, the increased use of alternatives to detention will limit the use of incarceration to those offenders for whom detention makes the most sense. Other offenders will remain in the community under probation and other types of community supervision, which keeps them close to home.

Especially as Tribes move toward implementation of enhanced sentencing and expanded jurisdiction, having Federal BOP space available for incarcerating offenders under Tribal law will be of increasing importance. While there have been concerns that Tribes are not taking advantage of the pilot program,⁵⁰ the reality is that meeting the requirements of the enhanced sentencing provisions under TLOA and the expanded jurisdiction under the VAWA Amendments take time. Many Tribes are working toward implementing one or both laws, and to remove the option for BOP placements limits their ability to successfully strengthen their justice systems.⁵¹

In fact, in addition to transitioning the program from a pilot effort to a permanent collaboration, BOP should consult with Tribes to reduce the administrative burden of using the Federal prison option. Among the few Tribes that have done so or attempted to, the administrative hurdles are significant, and a reduction in these barriers would increase Tribal access. For example, communication to the Commission suggests that the reports mandated by BOP for the placement of prisoners—reports that are completed by Federal pretrial services officers for Federal prisoners—are difficult and unwieldy for Tribal personnel to complete. TLOA already recommends that the Federal probation officers have a role delivering pretrial services and post-sentencing probation; their engagement with administrative reporting would simply be an extension of these services and help ensure appropriate information is provided about prisoners to BOP prior to their transfer.

CONCLUSION

Despite a growing number of higher-quality detention facilities in Indian country, there is a tremendous need for Tribes and the Federal government to collaborate on improving the condition, programs and services, and functionality of facilities. At the same time, Tribes are deeply interested in expanding available alternatives to detention in their communities. Certainly, upfront investments in improved detention facilities and the creation of quality alternatives to detention programs are necessary. But, because of the substantial cost savings associated with effective alternative programs, the spending profile may soon reflect a redirection of detention dollars, rather than an ongoing need for higher budgets.

Rather than fear such changes, Federal and State leaders should embrace them. Providing greater freedom of choice to Tribal governments to design and run their own correctional systems and to innovate more broadly with alternative (or what many Tribes prefer to call “traditional”) sentencing options, has enormous and largely untapped potential to save Federal and State taxpayers’ money. It can also make Native nations safer and more secure—thereby helping close the public safety gap—by relying on locally based systems that more accurately teach and enforce community values.

ENDNOTES

¹ *Ex parte Crow Dog*, 109 U.S. 556 (1883).

² *Id.* at 571.

³ 18 U.S.C. § 1153, 23 Stat. 385 (1885). Despite its remarkable longevity and pervasive impact in Indian country, the Major Crimes Act was attached to the annual congressional appropriations bill for 1885 as a so-called “rider” and never received a legislative hearing in either house of Congress. For a detailed review of the legislative history of the Act, see Troy A. Eid and Carrie Covington Doyle, *Separate But Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1076-85 (2010).

⁴ Todd Minton, *Jails in Indian Country*, 2011 at 2, Bureau of Justice Statistics, DOJ (2012), <http://www.bjs.gov/content/pub/pdf/jic11.pdf>.

⁵ *Id.* The total population of federal inmates under the jurisdiction of the Federal BOP, part of the DOJ, is approximately 219,000, or slightly less than one-tenth of one percent of the U.S. population. John P. Walters, “Who Gets Sent to Prison?” *The Weekly Standard*, p. 15 (Sept. 19, 2015).

⁶ Keith A. Wilmot & Miriam A. Delone, *Sentencing of Native Americans: A Multistage Analysis Under the Minnesota Sentencing Guidelines*, 8 J. ETHNICITY IN CRIM. JUSTICE 8, 151, 172 (2010), <http://dx.doi.org/10.1080/15377938.2010.502821>.

⁷ Wilmot & Delone, *supra* note 6 at 172-73.

⁸ Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 *Marquette L. Rev.* 723, 745 (2008).

⁹ *Id.* at 811.

¹⁰ STATE OF ALASKA, 2011 CENSUS DEMOGRAPHIC PROFILE, <http://labor.alaska.gov/research> and STATE OF ALASKA DEPARTMENT OF CORRECTIONS, 2011 OFFENDER PROFILE, <http://www.correct.state.ak.us/admin/docs/2011Profile06.pdf>

¹¹ Testimony of Arthur Pierce, Superintendent of Nation Police, Oneida Indian Nation, meeting of the Indian Law and Order Commission, Nashville, TN, July 12, 2012.

¹² See also USDOJ and DOI, Workgroup on Corrections, *Tribal Law and Order Act: Long Term Plan to Build and Enhance Tribal Justice Systems* 37-38 (2011), (especially pp. 37-38). <http://www.justice.gov/tribal/docs/tloa-tsp-aug2011.pdf>.

¹³ Eileen M. Luna-Firebaugh, *Incarcerating Ourselves: Tribal Jails and Corrections*, 83 *THE PRISON J.* 51, 64 (2003), <http://dx.doi.org/10.1177/0032885502250384>.

¹⁴ The BIA may use a different methodology to count Indian jails, however, as the Office of the Inspector General of the DOI counted 84 jails in 2011 versus 80 reported by the USDOJ in the same year. *Compare* DOI, Office of the Inspector General, *BIA Affairs Detention Facilities*, Report No.: WR-EV-BIA-0005-2010 (March 2011) and Minton, *supra* note 4.

¹⁵ Much of this money flowed from the DOJ. See Bureau of Justice Assistance, Office of Justice Programs, *Overview of Correctional Facilities on Tribal Lands*, https://www.bja.gov/Programs/Tribal_corrections/index.html; Jimmy Steeve, *Program Performance Report: Correctional Systems and Corrections Alternatives of Tribal Lands, October 2011-March 2012*,” USDOJ Bureau of Justice Assistance (2012), https://www.bja.gov/Publications/CSCATL_PPR_03-12.pdf; USDOJ, Bureau of Justice Assistance, *Fact Sheet: Planning Correctional Facilities on Tribal Lands*, Winter 2009, <https://www.bja.gov/Publications/TribalCorrFacilitiesFactSheet.pdf>. For information on increased spending by the BIA, see Semi-Annual Report to Congress, April 2011, DOI, Office of Inspector General 6, <http://www.doi.gov/oig/reports/upload/SemiannualApril2011Public.pdf>

¹⁶ Todd Minton, *Jails in Indian Country*, 2012 at 1, Bureau of Justice Statistics, DOJ (2013), <http://www.bjs.gov/content/pub/pdf/jic11.pdf>.

¹⁷ *Id.*

¹⁸ This is not only a finding of the Indian Law and Order Commission, but also a key conclusion in the DOJ and DOI's Workgroup on Corrections, *supra* note 12.

¹⁹ The BIA-OJS jail is now closed and the Tribe's Corrections Service has since begun operating a new adult detention center. See Rosebud Sioux Tribe Corrections Services website <http://www.rstcorrections.com/web/index.php?siteid=251>.

²⁰ USDOJ and USDOJ, *supra* note 12; William Daly and James Shorts, From Cell Block to Clubhouse, *AMERICAN JAILS* (September/October 2012), <http://www.readperiodicals.com/201209/2795836991.html>; Salt River Pima Maricopa Indian Community, Department of Corrections, "Corrections Facility," <http://www.srpmic-nsn.gov/government/doc/facility.asp>; Salt River Pima Maricopa Indian Community, Department of Corrections, "FAQ," <http://www.srpmic-nsn.gov/government/doc/faqs.asp>; Salt River Pima Maricopa Indian Community, Department of Corrections, "Latest News," Salt River Department of Corrections, accessed August 1, 2013, <http://www.srpmic-nsn.gov/government/doc/news.asp>.

²¹ Minton, *supra* note 16 at 5.

²² DOI, Office of Inspector General, *Neither Safe nor Secure: An Assessment of Indian Detention Facilities* (September 2004), July 28, 2013, <http://www.hsdl.org/?view&did=688492>.

²³ Minton, *supra* note 16 at 7.

²⁴ Semi-Annual Report to Congress, April 2011, DOI, Office of Inspector General 6, <http://www.doi.gov/oig/reports/upload/SemiannualApril2011Public.pdf>.

²⁵ *Id.* at 7.

²⁶ Minton, *supra* note 4 at 6.

²⁷ *Id.* Pre-trial detainees composed a consistent 39-44 percent of the tribal jail population over the period 2000-2012.

²⁸ *Tribes Sentencing Under New Federal Law*, CONFEDERATED UMATILLA J., December 2012, at 3, available at <http://www.umatilla.nsn.us/CUJ%20Dec%202012.pdf>

²⁹ Rachel Porter, Sophia Lee, & Mary Lutz, *Balancing Punishment and Treatment: Alternatives to Incarceration in New York City; Vera Institute of Justice* (May 2002) (New York study), http://www.vera.org/sites/default/files/resources/downloads/Balancing_ATI.pdf; John M. Ptacin, Jeremy Worley, and Keith Richotte, *The Bethel Therapeutic Court: A Study of How Therapeutic Courts Align with Yup'ik and Community-Based Notions of Justice*, 30 *Am. Indian L. Rev.* 133 (2005) (Bethel, Alaska tribal forums). Roger K. Warren, *Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries*, the Crime and Justice Institute, the National Institute of Corrections, & Community Corrections Division 24 (2007) (finding that well-implemented rehabilitation and treatment programs carefully targeted with the assistance of validated risk/needs-assessment tools at the right offenders can reduce recidivism by 10% to 20%), <http://static.nicic.gov/Library/023358.pdf>. Other key literature on the success of alternatives to detention include Michelle Evans-Chase & Huiquan Zhou, *A Systematic Review of the Juvenile Justice Intervention Literature: What It Can (and Cannot) Tell Us About What Works With Delinquent Youth*, 10 *Crime & Delinquency* 1 (December 2012) <http://dx.doi.org/10.1177/0011128712466693> and Vera Institute of Justice, *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* (July 2013), <http://www.vera.org/sites/default/files/resources/downloads/potential-of-community-corrections.pdf>. Comparison across studies suggests that some programs achieve reductions in recidivism even greater than 20%.

³⁰ See Memorandum re: Costs and Benefits/Costs Avoidance Reported by Drug Court Programs and Drug Court Program Evaluations Reports (rev.), DOJ. BJA Drug Court Clearinghouse, Bureau of Justice Assistance, Office of Justice Programs (August 4, 2011) http://www.ndcrc.org/sites/default/files/cost_benefits_costs_avoidance.pdf. The final sections of this compendium list the non-monetary benefits that derive from drug courts, a type of alternative sentencing.

⁵¹ See, *id.*

⁵² Administrative Office of the Courts, Center for Families, Children, and the Courts, *Research Summary: California Drug Court Cost Analysis Study 5* (May 2006), http://www.courts.ca.gov/documents/cost_study_research_summary.pdf.

⁵³ Thomas E. Swisstack, Douglas E. Mitchell, & Cynthia Leyba, *Smaller, Smarter and More Strategic: Juvenile Justice Reform in Bernalillo County*, Bernalillo County Youth Services Center Juvenile Detention Alternative Initiative (2011), <http://www.jdaihelpdesk.org/bernalillo/Smaller%20Smarter%20More%20Strategic%20Bernalillo%20County%202011.pdf>.

⁵⁴ Pew Center on the States, “*State of Recidivism: The Revolving Door of America’s Prisons*,” (April 2011), http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/Pew_State_of_Recidivism.pdf. 2015.

⁵⁵ The Annie E. Casey Foundation, *No Place For Kids The Case for Reducing Juvenile Incarceration* (2011), http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf.

⁵⁶ USDOJ and USDOJ Workgroup on Corrections, *supra* note 12 at 10.

⁵⁷ Historical U.S. American Indian policies include ejection from ancestral lands, confinement on reservations, armed reprisal, disruption of traditional lifestyles, ongoing competition for lands, theft of natural resources, suppression of Native religious practices, involuntary fostering and adoption arrangements for children or their forced attendance at distant boarding schools, prohibition of Tribal language use, and management of all aspects of Indian people’s lives by local “Indian agents” of the U.S. government. Unsurprisingly, these practices have caused intergenerational mental health problems. Often referred to as “historical trauma,” this form of post-traumatic stress disorder is common among peoples who have suffered from genocide, and has been linked to a greater propensity for alcohol and substance abuse and violence. In the simplest—but accurate—terms, those who have been exposed to violence tend to perpetuate violence, harming themselves, their families, and their communities. See Teresa Evans-Campbell, *Historical Trauma in American Indian/ Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities*, 25 J. OF INTERPERSONAL VIOLENCE 316 (March 2008); Historic Trauma May Be Causing Today’s Health Crisis, Public Broadcasting System, Indian Country Diaries Series, Sept. 2006, <http://www.pbs.org/indiancountry/challenges/trauma.html> (There also is an informative film clip at this site.).

⁵⁸ Korey Wahwassuck, John P. Smith, & John R. Hawkinson, *Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction*, 36 William Mitchell L. Rev. 859 (2009): 859-897; Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733 (2008); Testimony of Korey Wahwassuck, Hearing of the Indian Law and Order Commission, Salt River Indian Reservation, January 13, 2012 and Telephone Interview with the Commission, December 11, 2012, on file with the Commission.

⁵⁹ *Tulalip Alternative Sentencing Program*, in Harvard Project on American Indian Economic Development, HONORING NATIONS, 2006: CELEBRATING EXCELLENCE IN TRIBAL GOVERNANCE (2007), 8-13, available at <http://hpaied.org/images/resources/publibrary/Tulalip%20Alternative%20Sentencing%20Program.pdf>

⁴⁰ See, e.g., Mark Martin, *Native American and Alaskan Technical Assistance Project, Project Guide: Alternatives to Incarceration of Offenders*, National Institute of Corrections and Bureau of Justice Assistance, <https://www.bja.gov/Publications/AltIncarceration.pdf>; Karen Gottlieb, *Lessons Learned in Implementing the First Four Tribal Wellness Courts*, unpublished DOJ paper (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/251168.pdf>.

⁴¹ See the table “Number and Types of Drug Courts (As of December 31, 2011),” on the webpage National Institute of Justice, “Drug Courts,” <http://www.nij.gov/topics/courts/drug-courts/>.

⁴² Tribal Law and Policy Institute, *Tribal Healing to Wellness Courts: The Key Components*, Office of Justice Programs, USDOJ, NDJ 188154 at iii (April 2005), <https://www.ncjrs.gov/pdffiles1/bja/188154.pdf>.

⁴³ Fortunately, infrastructure is in place for such training; in part, through DOJ investments, entities such as the National Tribal Judicial Center of the National Judicial College and the Tribal Law and Policy Institute are in a position to offer training concerning broader alternatives to detention options. For information on the National Tribal Judicial Center see <http://www.judges.org/ntjc/>; for information on the Tribal Law and Policy Institute's Healing to Wellness Court trainings see http://www.tribal-institute.org/lists/drug_court.htm and <http://enhtraining.tlpi.org>. See also Kimberly A. Cobb & Tracy G. Mullins, *Tribal Probation: An Overview for Tribal Court Judges*, Bureau of Justice Assistance, USDOJ (May 2010), <http://www.appa-net.org/eweb/docs/appa/pubs/TPOTCJ.pdf>; Charlene Jackson, Carrie Garrow & Lawrence Lujan, *The Judge's Role in Tribal Healing to Wellness Court*, Presentation at the National Association of Drug Court Professionals 2015 Annual Drug Court Training Conference, Arlington, VA, July 15, 2013, available at [http://www.tribal-institute.org/download/NADCP/2015/Judges%20in%20Healing%20to%20Wellness%20Court%20-%20July%202015%202013%20\[Read-Only\].pdf](http://www.tribal-institute.org/download/NADCP/2015/Judges%20in%20Healing%20to%20Wellness%20Court%20-%20July%202015%202013%20[Read-Only].pdf)

⁴⁴ Steven W. Perry, *Census of Tribal Justice Agencies in Indian Country*, 2002 at 43, 52-56, USDOJ, Bureau of Justice Statistics (December 2005), <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf>.

⁴⁵ *Id.* at 43.

⁴⁶ Ram Subramanian & Rebecca Tublitz, *Realigning Justice Resources: A Review of Population and Spending Shifts in Prison and Community Corrections*, Vera Institute of Justice (September 2012), http://www.vera.org/sites/default/files/resources/downloads/Realigning_Justice_full_report.pdf.

⁴⁷ *Press Release, Justice Department Announces \$58 Million to Improve Reentry Outcomes: Grants Support Improved Probation, Parole and Reentry Programs*, USDOJ, Office of Public Affairs, October 1, 2012, <http://www.justice.gov/opa/pr/2012/October/12-ag-1185.html>.

⁴⁸ The connections are especially evident in recent guides for tribes concerning the development of alternatives to detention and reentry programming. On the development of alternatives to detention, see Martin, *supra* note 40. On the development of reentry programming, see Ada Pecos Melton, Roshanna Lucero, & David J. Melton, *Strategies for Creating Offender Reentry Programs in Indian Country*, American Indian Development Associates (August 2010), http://www.aidainc.net/Publications/Full_Prisoner_Reentry.pdf.

⁴⁹ On DOJ funding see, *Press Release, Justice Department Announces \$58 Million to Improve Reentry Outcomes: Grants Support Improved Probation, Parole and Reentry Programs*, USDOJ, Office of Public Affairs, October 1, 2012, <http://www.justice.gov/opa/pr/2012/October/12-ag-1185.html>. On SAMHSA funding, see *SAMHSA Bulletin, SAMHSA is accepting applications for up to approximately \$12.9 million in Offender Reentry Program grants*, February 19, 2013, <http://www.samhsa.gov/newsroom/advisories/1302192652.aspx>. On CMS efforts, see Council of State Governments Justice Center, *The Implications of the Affordable Care Act on People Involved with the Criminal Justice System*, CORRECTIONS.COM, May 27, 2013, <http://www.corrections.com/news/article/33145-the-implications-of-the-affordable-care-act-on-people-involved-with-the-criminal-justice-system>; Susan D. Phillips, *The Affordable Care Act: Implications for Public Safety and Corrections Populations*, The Sentencing Project, (September 2012), http://sentencingproject.org/doc/publications/inc_Affordable_Care_Act.pdf. On other DHHS efforts see Erica Meade and Linda Mellgren, *Overview and Inventory of HHS Efforts to Assist Incarcerated and Reentering Individuals and their Families*, Office of the Assistant Secretary for Planning and Evaluation (January 2010), <http://aspe.hhs.gov/hsp/11/incarceration&reentry/Inventory/index.pdf>. On Veterans Association funding see program information on the webpage *Incarcerated Veterans*, National Coalition for Homeless Veterans, http://nchv.org/index.php/help/help/incarcerated_veterans/. The Veterans Administration also supports a pilot effort, the Incarcerated Veterans Outreach Initiative, homepage at <http://www.nynj.va.gov/homeless.asp>.

⁵⁰United States General Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Department of Justice Could Clarify Tribal Eligibility for Certain Grant Funds* (May 30, 2012), <http://www.gao.gov/assets/600/591213.pdf>.

⁵¹In fall 2013, the Commission has learned that at least these Tribes are may be actively pursuing TLOA implementation, or have already done so: Chickasaw Nation, Eastern Band of Cherokee, Fort McDowell Yavapai Nation, Gila River Indian Community, Hopi Tribe, Rosebud Sioux Tribe, Salt River Pima-Maricopa Indian Community, Southern Ute Indian Tribe, Snohomish Tribe of Indians, and Tulalip Tribes and Confederated Tribes of the Umatilla Indian Reservation.



JUVENILE JUSTICE: FAILING THE NEXT GENERATION

Indian country juvenile justice exposes the worst consequences of our broken Indian country justice system. At the same time, juvenile justice illustrates the fundamental point and promise of this report—greater Tribal freedom to set justice priorities, supported by resources at parity with other systems and full protection of Federal civil rights of all U.S. citizens, will produce a better future for Indian country and, importantly, for Native youth.

FINDINGS AND CONCLUSIONS: VULNERABLE AND TRAUMATIZED YOUTH

Any discussion of Indian country juvenile justice must begin with the dire situation of Indian children. Today’s American Indian and Alaska Native youth have inherited the legacy of centuries of eradication- and assimilation-based policies directed at Indian people in the United States, including removal, relocation, and boarding schools.² This intergenerational trauma continues to have devastating effects among children in Indian country, and has resulted in “substantial social, spiritual, and economic deprivations, with each additional trauma compounding existing wounds over several generations.”³

National statistical data, which include the 64 percent of Indian children who live outside Indian country as well as the 36 percent who live within, indicate that Native youth are among the most vulnerable

Today's Tribal youth carry the wounds of their ancestors, compounded by generations of atrocities committed against this nation's Indigenous people, including historical traumatic campaigns of eradication, reservation assignment, boarding schools, and relocation. Although they carry these wounds, these contemporary youth will be the first generation with an opportunity to heal from historical trauma.¹

Ivy Wright-Bryan, National Director of Native American Mentoring, Big Brothers Big Sisters of America

One year before I was 17, I was a pallbearer at 15 funerals.

Northern Arapaho youth⁸

We have concluded that 100 percent of our children and youth are exposed to violence, directly or indirectly....We now know that at least two children a day are victims of a crime, exposed to abuse and neglect, school violence, and domestic violence on the Rosebud reservation. We know that the unreported direct and indirect exposures to violence must be significantly higher.¹⁵

Mato Standing-High, former Attorney General, Rosebud Sioux Tribe

group of children in the United States. Over a quarter of these children live in poverty, compared with 13 percent of the general population.⁴ They graduate from high school at a rate 17 percent lower than the national average, and are expected to live 2.4 years less than other Americans.⁵ The rates of cigarette use, binge drinking, and illegal drug use among Native youth are higher than for any other racial and ethnic group.⁶ Native youth are more than twice as likely to die as their non-Native peers through the age of 24.⁷

One of the most troubling problems facing Native youth today is their level of exposure to violence and loss. Such exposure may include witnessing, being the victim of, or learning about domestic and intimate partner violence, child abuse, homicide, suicide, sexual violence, and community violence.⁹ While statistics about the overall rates of exposure of Native youth to violence are difficult to find, statistics about specific types of violence and exposure to violence in particular Native communities indicate the levels are extremely high. A report published by the Indian Country Child Trauma Center in 2008 calculates that Native youth have a 2.5 times greater risk for experiencing trauma when compared with their non-Native peers.¹⁰ Of all racial groups in the United States, American Indians and Alaska Natives have the highest per capita rate of violent victimization.¹¹ Native youth experience double the rates of abuse and neglect of White children, and are more likely to be placed in foster care. American Indian and Alaska Native women experience the highest rates of sexual assault and domestic violence in the nation. Native youth between the ages of 12 and 19 are more likely than non-Native youth to be the victim of either serious violent crime or simple assault. Native youth are 2.5 times more likely to commit suicide than non-Native youth.¹²

Indian juveniles experience Post Traumatic Stress Disorder (PTSD) at a rate of 22 percent, close to triple the rate of the general population. As Ryan Seelau points out, “to put this in perspective, this rate of PTSD exceeds or matches the prevalence rates of PTSD in military personnel who served in the latest wars in Afghanistan, Iraq, and the Persian Gulf War.”¹⁵ Further, “American Indian and Alaska Native children are... exposed to repeated loss because of the extremely high rate of early, unexpected, and traumatic deaths [among Native people in the United States] due to injuries, accidents, suicide, homicide, and firearms—all of which exceed the U.S. all-races rates by at least two times—and due to alcoholism, which exceeds the U.S. all-races [rate] by seven times.”¹⁴

Leaders from some Native communities estimate that nearly all of their children are exposed to violence.¹⁶ A 2003 U.S. Department of Health and Human services report estimated that on the Wind River Indian reservation, “66 percent of families have a history of family violence, 45 percent of children have run away, 20 percent of children have been sexually abused, and 20 percent have attempted suicide. Life expectancy is in the early 40s for Tribal members.”¹⁷

Too often [children exposed to violence] are labeled as “bad,” “delinquent,” “troublemakers,” or “lacking character and positive motivation.” Few adults will stop and, instead of asking “What’s wrong with you?” ask the question that is essential to their recovery from violence: “What happened to you?”²¹

*Robert L. Listenbee, Jr. et al.
Report of the Attorney General’s National Task Force on Children Exposed to Violence*

On the Rosebud Sioux reservation in South Dakota, former Attorney General Mato Standing-High estimates that every child on the reservation has been exposed to violence.¹⁸ Confirmation of this level of violence can be found in the number of calls to police. The 12 officers serving the 25,000-person service area receive close to 25,000 calls per year, approximately one call for every resident of the reservation. “At least two children a day are victims of a crime, exposed to abuse and neglect, school violence, and domestic violence,” Standing-High says.¹⁹ In Alaska in 2010, 40 percent of children seen at child advocacy centers were Alaska Natives, even though the overall population of Alaska Native peoples is 14.8 percent.²⁰

According to the U.S. Department of Justice’s (DOJ) Defending Childhood Initiative, “[e]xposure to violence causes major disruptions of basic cognitive, emotional, and brain functioning that are essential for optimal development ...When [children who experience violence] go untreated, these children are at a significantly greater risk than their peers for aggressive, disruptive behaviors; school failure; posttraumatic stress disorder; anxiety and depressive disorders; alcohol and drug abuse; risky sexual behavior; delinquency; and repeated victimization.”²² Further, research indicates that exposure to violence is associated with “long-term physical, mental, and emotional harms,” including “alcoholism, drug abuse, depression, obesity, and several chronic adult diseases.”²⁵ Because of the compounding effects of historical trauma in Indian country, “untreated trauma poses the greatest risk for further complications and risk for additional trauma in Tribal communities.”²⁴

American Indian and Alaska Native children are disproportionately exposed to violence and poverty, and their communities often lack access to funding for mental health and other support resources. The compounding effects of these realities make this population of children particularly susceptible to entry into the juvenile justice system, and increase the obstacles they face to a successful and healthy reentry. Further exacerbating these damaging vulnerabilities, entry into the justice system often means that children are separated from their Tribal communities and culture, robbing Tribes of their ability to shape the lives of their children, and removing the youth from one of their most essential resources for support, healing, and recovery.

Congress passed the Indian Child Welfare Act (ICWA) of 1978²⁵ to help ensure the safety of Indian children. ICWA also established in Federal law the fundamental principle that young Tribal citizens, when in need of out-of-home care, should first be referred to their Tribes for placement. A key reason is that through the care and nurturing of children, Tribal culture and traditions are passed on to future generations, which is an important element in the survival of Indian nations. Nonetheless, Federal law is incomplete in its protections of Tribal youth and Native nations. When Tribal youth commit offenses that would be crimes if committed by adults, ICWA does not apply at present, and processes outside the Tribal

Children should not be in an adult system, (particularly) an adult system which is not prepared to work with youth. There needs to be some sort of alternative that the youth still need to be able to access— there still needs to be a justice system accountable but through a rehabilitative system.³⁰

*Chori Folkman, Managing Attorney, Tulalip Office of Civil Legal Aid
Testimony before the Indian Law and Order Commission, Hearing on Tulalip Indian Reservation
September 7, 2011*

government's control remove young Tribal citizens from their homes and place them in State or Federal facilities, sometimes far from their homes.

FINDINGS AND CONCLUSIONS: FEDERAL AND STATE JUVENILE JUSTICE ARE MAKING MATTERS WORSE, NOT BETTER

At present, Tribal youth who live on reservations, like their adult counterparts, are under the authority of one of several jurisdictional arrangements: they may be subject to many different regimes: Federal, Tribal-Federal, State, or State-Tribal. The same complexities and inadequacies that plague the Indian country adult criminal justice system impair juvenile justice as well. As with adults, Tribes face significant obstacles toward influencing the lives of their young Tribal citizens involved in juvenile justice systems. In addition, features of the Federal and State juvenile justice systems, combined with the special needs of traumatized Native youth, magnify the problems.

The Federal court system has no juvenile division—no specialized juvenile court judges, no juvenile probation system—and the Bureau of Prisons (BOP), a DOJ component, has no juvenile detention, diversion, or rehabilitation facilities. Federal judges and magistrates, for whom juvenile cases represent 2 percent or less of their caseload,²⁶ hear juvenile cases along with all others. Native youth processed at the Federal level, along with their families and Tribes, face significant challenges, such as great physical distance between reservations and Federal facilities and institutions, and cultural differences with federal personnel involved in Federal prosecution.²⁷ If juveniles are detained through the Federal system, it is through contract with State and local facilities, which may be several States away from the juvenile's reservation.²⁸

Within Federal juvenile detention facilities for misdemeanor violations operated in Indian country by the Office of Justice Services (OJS), a component of the Bureau of Indian Affairs (BIA), secondary educational services are either lacking or entirely non-existent. Officials of the Federal Bureau of Indian Education, which is statutorily responsible for providing secondary educational services and programs within OJS juvenile detention centers, confirmed for the Commission that Congress has not appropriated any Federal funds for this purpose in recent years. This means that Native children behind bars are not receiving any classroom teaching or other educational instruction or services at all.²⁹

When one of the situations triggering Federal Indian country juvenile jurisdiction arises, the corresponding U.S. Attorney's Office decides whether to proceed against the Native youth. This decision is based on "seriousness of the crime, age, criminal history, evidence available, and Tribal juvenile justice capacity."³¹ As with adults, the U.S. Attorneys often decline to prosecute juvenile cases, even serious ones. As one research study points out, "[t]ribal governments are left to fill this void . . . [and] . . . many youth simply fall through the cracks, getting no intervention at all."³²

“Within Federal juvenile detention facilities for misdemeanor violations operated in Indian country by the Office of Justice Services (OJS), a component of the Bureau of Indian Affairs (BIA), secondary educational services are either lacking or entirely non-existent....

Native children behind bars are not receiving any classroom teaching or other educational instruction or services at all.”

Because some Tribes do not currently have the infrastructure or funding to house juveniles, they are unable to address problems with youth in their communities.

Indian country youth may become part of State juvenile justice systems if they commit a crime in a Tribal community where State criminal jurisdiction extends to Indian country under P.L. 83-280, a settlement act, or some other similar Federal law.³³ In State juvenile systems, there is generally no requirement that a child's Tribe be contacted if an Indian child is involved.³⁴ Thus, "once Native youths are in the system, their unique circumstances are often overlooked and their outcomes are difficult to track."³⁵ The juveniles effectively "go missing" from the Tribe. Furthermore, State juvenile systems do not adequately provide the cultural support necessary for successful rehabilitation and reentry back into the Tribal community.³⁶

Although data about Indian country juveniles in Federal and State systems are limited, the available data reveal alarming trends regarding processing, sentencing, and incarcerating Native youth. Native youth are overrepresented in both Federal and State juvenile justice systems and especially in receiving the most severe dispositions.

While the Federal government does not have a "juvenile justice system," youth do end up in Federal detention, and typically, the majority of these youth are American Indians and Alaska Natives. Between 1999-2008, for example, 43-60 percent of juveniles held in Federal custody were American Indian. In 2008, 72 Native youth were in Federal custody,³⁷ although the number fell to 49 in 2012.³⁸ According to the BOP, contracting to place a juvenile costs \$259 per day or \$94,535 per year.³⁹

Many States have significant populations of Native youth within their systems, and there are a disproportionate number of Native juveniles in State juvenile justice systems compared with non-Indian juveniles.⁴⁰ Although the State systems data do not separate Indian country youth and offenses from others, there is no reason to believe there are systematic differences.

In 2010 in the State systems, American Indians made up 367 of every 100,000 juveniles in residential placement, compared with 127 of 100,000 for White juveniles.⁴¹ This is especially alarming since American Indians make up little more than 1 percent of the U. S. population. In Oregon, a P.L. 83-280 State, Native American youth are over-represented in the State's juvenile justice system and in its detention programs run by the Oregon Youth Authority (OYA). While Native American youth make up approximately 2 percent of the State's 10-17 year olds, they are 5 percent of the youth committed to OYA.⁴² In 2008, the average cost for juvenile detention was \$240.99 per day or \$87,961.35 per year.⁴³

[W]here they exist, Tribal facilities, based in the community and therefore able to involve Tribal elders in the delivery of interventions that incorporate traditional Tribal beliefs and customs, may be better positioned to provide culturally competent services than the Federal system.

Consensus view expressed by both Federal and Tribal officials surveyed by the Urban Institute ⁴⁴

FINDINGS AND CONCLUSIONS: APPLYING THIS REPORT'S RECOMMENDATIONS FOR ADULT CRIMINAL JUSTICE TO JUVENILE JUSTICE

Indian country juvenile justice is even more disturbingly broken than its adult counterpart. Tribal youth in non-P.L. 83-280 jurisdictions become ensnared in a Federal system that was never designed for juveniles and literally has no place to put them. In P.L. 83-280 jurisdictions, Tribal youth may be thrust into dysfunctional State systems that pay no attention to the potential for accountability and healing available in the Tribal community. In both situations, there is no regularized way of ensuring that the Tribal community can know where its children are, let alone participate in fashioning a better future for them. These and other shortcomings of the Indian country juvenile justice system compromise traumatized, vulnerable young lives, rupture Native families, and weaken Tribal communities that depend on their youth for their future.

How to improve juvenile justice for Native communities and break cycles of intergenerational trauma and violence? Many recommendations in this report for the adult justice system apply with even greater urgency to Indian country juvenile justice. All of this report's recommendations for juvenile justice drive toward a single end—enabling Tribal communities to know where their children are and to be able to determine the proper assessment and response when their children enter the juvenile justice system.

The Commission's aim for juvenile justice is consistent with the overall thrust of this report—releasing Tribes from dysfunctional Federal and State controls and empowering them to provide locally accountable, culturally informed self-government. With the very health and future of Tribal communities resting on the vulnerable shoulders of their often-traumatized youth, the stakes could not be higher.

RECOMMENDATIONS

Recommendations concerning jurisdiction. For a Native nation, losing control over its children has ramifications beyond losing control over adult offenders. The Congress that passed the Indian Child Welfare Act of 1978 recognized that “[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.”⁴⁵ Enhancing Tribal jurisdiction over Indian children was central to ICWA's scheme for remedying this problem.

For non-P.L. 83-280 jurisdictions, ICWA clarified that Tribal jurisdiction is exclusive for children residing or domiciled in Indian country. For P.L. 83-280 jurisdictions, ICWA created a mechanism for Tribes to reassume exclusive jurisdiction, regardless of State consent, but subject to Federal approval. ICWA limited its Tribal jurisdiction-enhancing

provisions to dependency cases, that is, cases involving parental abuse or neglect. Delinquency cases involving acts by juveniles that would be criminal if committed by an adult were excluded.

The rationale for jurisdictional change presented earlier (Chapter 1) applies as readily to juvenile offenses as to adult. Just as Tribal self-determination and local control are the right goals for adult criminal matters, they are the right goals for juvenile matters. Just as distance, both geographic and cultural, reduces the legitimacy and effectiveness of Federal adult criminal justice in Indian country, so too does distance impede Federal juvenile justice.

There are, however, additional reasons for striving to return exclusive juvenile jurisdiction to the Tribes that want it. As discussed at the outset of this chapter, the Federal justice system is not designed or equipped to deal with juveniles. The lack of diversion services and programs, parole, and other aspects of State and local justice systems means that Native juveniles in Federal custody are systematically receiving longer sentences of incarceration for the same or similar offenses. Moreover, the link between dependency and delinquency among Indian youth makes it anomalous to have dependency jurisdiction exclusively Tribal, but delinquency jurisdiction shared with the Federal system. If many Tribal delinquency cases are really extensions of dependency-related conditions, then it makes sense to integrate greater Tribal authority over both.

Based on these conclusions, the Commission recommends that Tribal communities that have the capacity and desire to do so should be able to regain control over juvenile justice, leading to two recommendations concerning jurisdiction.

6.1: Congress should empower Tribes to opt out of Federal Indian country juvenile jurisdiction entirely and/or congressionally authorized State juvenile jurisdiction, except for Federal laws of general application.

Analogous to the process set forth in the Chapter 1 (Jurisdiction: Bringing Clarity Out of Chaos), for any Tribe that exercises this option, Congress would recognize the Tribe's inherent jurisdiction over those juvenile matters, subject to the understanding that juveniles brought before Tribal courts would receive equivalent protection of their civil rights than to that they would receive in the Federal system, and the juveniles would be entitled to limited review of any judgments entered against them in a newly created U.S. Court of Indian Appeals. As in adult criminal court, the Tribe opting for this exclusive jurisdiction could offer alternative forms of justice, such as a juvenile wellness court, a teen court, or a more traditional peacemaking process, so long as the juvenile properly waived his or her rights.

If Tribes choose not to opt out entirely from the Federal criminal justice system for offenses allegedly committed by their juvenile citizens, Tribal governments should still be provided with a second option:

6.2: Congress should provide Tribes with the right to consent to any U.S. Attorney's decision before Federal criminal charges against any juvenile can be filed.

The U.S. Criminal Code already provides for such Tribal consent in adult cases where Federal prosecutors are considering seeking the death penalty. Specifically, in 1994 Congress required that notwithstanding the General Crimes Act⁴⁶ and the Major Crimes Act,⁴⁷ no person subject to the criminal jurisdiction of an Indian Tribal government shall be subject to a capital sentence for any Federal offense committed within Indian country unless the governing body of the Tribe has authorized the death penalty to be imposed as a sentence.⁴⁸ The same reasoning ought to apply to U.S. Attorneys' decisions to file Federal charges against Indian juveniles for Indian country offenses. The governing body of the young person's Tribal government—that is, the Tribal council, business committee, or other such institution as established by that Indian nation's own laws—should be required to consent before that Tribe's juvenile citizen is subjected to Federal Indian country criminal jurisdiction. Such consent would help ensure that community standards are applied and Tribal sentencing options carefully considered, before any Federal prosecution could proceed.

Recommendations related to strengthening Tribal justice. During its site visits, the Commission questioned Tribal juvenile justice officials about the reasons why some juvenile cases get referred to the Federal system or handled by a county in a P.L. 83-280 State. Was it because the Tribe lacked sufficient sentencing authority to manage the proceeding itself (due to limitations imposed by the Indian Civil Rights Act), or was it because the Tribe lacked resources to address the youths' need for treatment? Insufficient resources, not inadequate detention authority, was almost always the response.⁴⁹ Resources for Indian country juvenile justice must be more effectively deployed in the interests of achieving parity between Tribal and non-Indian justice systems, safer Tribal communities, and healthier Tribal youth.

For example, on the Wind River Indian Reservation in Wyoming, homeland of the Eastern Shoshone and Northern Arapaho Tribes, Tribal officials testified about the scope of the situation they face. The child protective services agency, with a caseload larger than the city of Cheyenne, has only one-third the available staff. There are only 2 juvenile probation officers available to manage 45 cases. They cannot refer matters to a juvenile drug court because on this vast reservation there is not a close enough monitoring site. There is no detoxification placement at all for juveniles, so they wind up being released without any assistance from social services. And the only local detention placement for juveniles is in a county facility that is about to close.

We do have a green reentry program in our juvenile detention center, and they are half way through a 4-year grant. And that program has been very successful at keeping our juveniles in school and keeping them from returning to detention. But again, it's a 4-year grant and not sustainable.⁵²

*Miskoo Petite, Facility Administrator, Rosebud Sioux Tribe Correction Services
Testimony before the Indian Law and Order Commission, Hearing at Rosebud Indian Reservation
May 16, 2012*

Despite these difficulties, the Wind River community has done its best to piece together resources to help prevent and address substance abuse and violence among its youth. Sadly, the impetus for much of this action was a shocking string of youth suicides in the 1980s. The national organization UNITY has an active chapter there, led by boys and girls representing each high school. Known as the Youth Council, it sponsors monthly meetings and events focused on connecting with tradition, community betterment, leadership skills, healthy lifestyles without drugs and alcohol, anti-bullying, and transition to college. At least 20 of its participants have gone on to college. One Youth Council member was so incensed by what he regarded as a negative story about Wind River that appeared in *The New York Times* that he sent in an essay response, pointing out all that was positive in his community, including continuity of culture, community events, and people who are sober and care for their families. *The Times* published this response on its website.

Another Tribal initiative, the Wind River Tribal Youth Program, blends prevention, treatment, and Tribal tradition to assist a diverse array of Tribal youth who may be on probation, in foster care, runaways, truants, referred by family members, or just coming on their own. Elders play a key role in many of the activities, including weekly sweat ceremonies. In 2012, the Federal Substances Abuse and Mental Health Services Administration (SAMHSA) within the U.S. Department of Health and Human Services recognized the Tribal Youth Program with its Voices of Prevention Award. It was one of five prevention and substance abuse programs in the country to receive such an award, and the only one that was reservation-based. Its participants speak highly of the impact that sweats, talking circles, and other tribally based activities have had in enabling them to see beyond the cycles of substance and domestic abuse.

Like many Tribal communities the Commission visited, Wind River is investing the very limited resources at its disposal in such youth programs. The Tribal resources available are no match for the magnitude of the problems, however, and Federal support is both inadequate and poorly deployed. Most Federal community-based juvenile justice programs⁵¹ are funded piecemeal, and are burdened by extensive reporting requirements. Further, administering a program through multiple 2- to 4-year grants is unsustainable. Any tribally operated program runs the risk of losing critical components because of temporary funding.

Most critically, as the Wind River case underscores, funding is needed for the prevention and treatment components of juvenile justice services. There is not enough institutional support in Tribal communities to keep youth busy so they do not get into trouble, as well as to actively reach the ones who are already following the path of delinquency. This issue needs to be addressed at the community level. It can include participating in traditional activities, Boys and Girls Clubs, community sports teams, active social services, and truancy prevention. Though these efforts are likely to be community-led, they still need funding.

As the example of Salt River Pima-Maricopa Indian Community shows, where Tribes have benefited from more ample resources, as from Tribal gaming enterprises, they have demonstrated success in treating youth and turning them away from self-defeating and destructive behaviors. The Commission convened a field hearing at Salt River and was inspired to see some of its juvenile justice programs in action. However, few Native nations are in a position to have revenue streams from such highly successful economic development ventures in an urban setting. For them, Federal support for similar Tribal programs can have the same benefits, making communities safer and youth healthier.

If Federal, State, and Tribal agencies are to be accountable for their use of juvenile justice resources, data about Tribal children in those systems must be maintained. As this report's chapter on strengthening Tribal justice points out (Chapter 3), adult crime data are entirely unavailable for P.L. 85-280 Tribes and for other Tribes subject to State jurisdiction. The Federal system also does a poor job of maintaining Indian country statistics for policing, court actions, probation, detention, and other justice system stages.

The deficiencies in the availability of data for adult criminal justice are magnified in the case of juveniles. In 2009, two agencies within the U.S. Department of Justice (DOJ), the Bureau of Justice Statistics (BJS) and the Office of Juvenile Justice and Delinquency Prevention (OJJDP), commissioned the Urban Institute to analyze data on juveniles in the Federal justice system, focusing specifically on Tribal youth. Early on, the authors felt compelled to offer a major caveat about the reliability of the data, which came from a variety of sources, including BIA, DOJ, and BOP. The Urban Institute warned:

The project team encountered numerous challenges in identifying these cases, primarily because neither juvenile cases nor IC [Indian country] cases are recorded in a consistent manner across federal agencies. The capacity of agency data systems to identify juveniles and Indian Country cases vary substantially. There are some agency data systems that simply lack an indicator variable to identify IC juveniles ... *As such, we must caution the reader that the numbers of Indian Country juvenile cases reported in this study vary considerably from stage to stage and do not necessarily track well or consistently across processing stages.* As a result of these limitations with the data, we are left, not with a clear picture of juveniles and Tribal youth, but instead a mosaic with some missing pieces [emphasis in the original].⁵⁵

If a study sponsored by the Federal government cannot secure complete and consistent data about Tribal youth in the Federal justice system, Tribal communities have no hope of learning how many of their children are engaged with the system at various stages. However bad this arrangement is for juveniles involved in the Federal system, the problem

is considerably worse in P.L. 83-280 and other State jurisdiction situations. For purposes of collecting and maintaining statistics, those States treat Tribal children without regard to the location of the juvenile's misbehavior or the child's Tribal membership.⁵⁴ Thus, there are no data, period. It is simply impossible for Tribes to evaluate how Federal and State systems are managing their children in the absence of data. Proper data collection is also essential if Tribes and families are to maintain contact with Tribal youth, many of whom may be sent to facilities far from home.

This Commission's recommendations in Chapter 3 for strengthening Tribal justice—better coordinated, more effectively directed resources that are sufficient to achieve parity with non-Indian justice systems—apply with special force to juvenile justice.

6.3: Because resources should follow jurisdiction, and the rationale for Tribal control is especially compelling with respect to Tribal youth, resources currently absorbed by the Federal and State systems should flow to Tribes willing to assume exclusive jurisdiction over juvenile justice.

6.4: Because Tribal youth have often been victimized themselves, and investments in community-oriented policing, prevention, and treatment produce savings in costs of detention and reduced juvenile and adult criminal behavior, Federal resources for Tribal juvenile justice should be reorganized in the same way this Commission has recommended for the adult criminal justice system. That is, they should be consolidated in a single Federal agency within the U.S. Department of Justice, allocated to Tribes in block funding rather than unpredictable and burdensome grant programs, and provided at a level of parity with non-Indian systems. Tribes should be able to redirect funds currently devoted to detaining juveniles to more demonstrably beneficial programs, such as trauma-informed treatment, and greater coordination between Tribal child welfare and juvenile justice agencies.

6.5: Because Tribal communities deserve to know where their children are and what is happening to them in State and Federal justice systems, and because it is impossible to hold justice systems accountable without data, both Federal and State juvenile justice systems must be required to maintain proper records of Tribal youth whose actions within Indian country brought them into contact with those systems. All system records at every stage of proceedings in State and Federal systems should include a consistently designated field indicating Tribal membership and location of the underlying conduct within Indian country and should allow for tracking of individual children. If State and Federal systems are uncertain whether a juvenile arrested in Indian country is, in fact, a Tribal member, they should be required to make inquiries, just as they are for dependency cases covered by the Indian Child Welfare Act.⁵⁵

6.6: *Because American Indian/Alaska Native children have an exceptional degree of unmet need and the Federal government has a unique responsibility to these children, a single Federal agency should be designated to coordinate the data collection, examine the specific needs, and make recommendations for American Indian/Alaska Native youth. This should be the same agency within the U.S. Department of Justice referenced in Recommendation 6.4. A very similar recommendation can be found in the 2013 Final Report of the Attorney General’s National Task Force on Children Exposed to Violence.*

Recommendations concerning detention and alternatives. Alternatives to detention are even more imperative for Tribal youth than for adult offenders. Experts in juvenile justice believe detention should be a rare and last resort for all troubled youth, limited to those who pose a safety risk or cannot receive effective treatment in the community.⁵⁶ According to the Attorney General’s National Task Force on Children Exposed to Violence, “[t]he vast majority of children involved in the juvenile justice system have survived exposure to violence and are living with the trauma of that experience....What appears to be intentional defiance and aggression ... is often a defense against the despair and hopelessness that violence has caused in these children’s lives. When the justice system responds with punishment, these children may be pushed further into the juvenile and criminal justice systems and permanently lost to their families and society.”⁵⁷

Drawing on extensive research and the experience of states that have reduced their juvenile detention substantially, Bart Lubow, Director of the Annie E. Casey Foundation’s Juvenile Justice Strategy Group, told the Commission that “[J]uvenile detention and incarceration are generally unsafe, abusive, ineffective, and horribly expensive interventions that generally worsen the likelihood that the kids who come before juvenile courts will, in fact, succeed as adults.”⁵⁸ He also pointed out the likelihood that “children from different racial or ethnic background would be treated differently simply as a result of those characteristics.”⁵⁹

The implications for Indian country juvenile justice are clear. Tribal youth often experience severe trauma that is not only immediate, but also intergenerational—a legacy of dispossession and forced assimilation.⁶⁰ At one large reservation the Commission visited, a Tribal juvenile justice official pointed out that 80 percent of those who were referred for mental health treatment had previously attempted to commit suicide and that all of them had at least one friend or relative who had committed suicide.⁶¹

Data show that Federal and State juvenile justice systems take Indian children, who are the least well, and make them the most incarcerated. When they do incarcerate them, it is often far from their homes, diminishing prospects for positive contact with their communities.⁶² Furthermore, conditions of detention often contribute to the very trauma

that American Indian and Alaska Native children experience.⁶⁵ Detention is often the wrong alternative for Indian country youth, yet it is often the rule rather than the exception.

The Commission also heard widespread evidence that when Tribal children are detained in BIA-operated facilities, schooling and mental health services are unavailable to them. For example, the Ute Mountain Ute Tribe in Colorado and Utah utilizes a BIA Code of Federal Regulations (CFR) court⁶⁴ rather than its own Tribal court, and juveniles who come before that court may be sent for detention to a regional Federal facility in Towaoc, Colorado. As the Tribe's director of social services, Janelle Doughty, told the Commission, "I asked about education in our juvenile facility there.... There is no program. We do not have an educational program. We do not have any counseling services.... So we house them, they just sit there."⁶⁵

These findings lead the Commission to conclude that detention or secure treatment must be the last resort for Indian country juveniles, and appropriate alternatives should be legally preferred and practically available. Where detention or secure treatment is necessary, they should be structured and administered to meet the needs of Tribal youth. The Commission specifically recommends:

6.7: Whether they are in Federal, State, or Tribal juvenile justice systems, children brought before juvenile authorities for behavior that took place in Tribal communities should be provided with trauma-informed screening and care, which may entail close collaboration among juvenile justice agencies, Tribal child welfare, and behavioral health agencies. A legal preference should be established in State and Federal juvenile justice systems for community-based treatment of Indian country juveniles rather than detention in distant locations, beginning with the youth's first encounters with juvenile justice. Tribes should be able to redirect Federal funding for construction and operation of juvenile detention facilities to the types of assessment, treatment, and other services that attend to juvenile trauma.

6.8: Where violent juveniles require treatment in some form of secure detention, whether it be through BOP-contracted State facilities, State facilities in P.L. 83-280 or similar jurisdictions, or BIA facilities, that treatment should be provided within a reasonable distance from the juvenile's home and informed by the latest and best trauma research as applied to Indian country.

Recommendations concerning intergovernmental cooperation.

Intergovernmental cooperation is essential to achieve more effective use of limited resources and greater accountability to Tribal communities as long as Native nations share authority with Federal and State governments in the complex system of Indian country criminal justice. Government-to-government partnerships grounded in mutual respect have been shown to improve community safety while reducing redundancies, conflicts, and costs.⁶⁶ For some Tribes, including very small nations and those

[W]hen the monies run out or there's no service available, we have to send our kids to Kyle, South Dakota, which is an 8-hour drive—or 6-hour drive from us, and that's where our youth are detained over the weekend or if they have to go back, they are detained there.

*Statement of Vivian Thundercloud, Chief Clerk and Court Administrator, Winnebago Tribe of Nebraska
Testimony before the Indian Law and Order Commission, Hearing in Oklahoma City, OK
June 14, 2012*

enjoying good relations with local States, counties, and municipalities, intergovernmental cooperation may even be a better alternative than assuming exclusive jurisdiction.

Where juveniles are involved, intergovernmental cooperation is especially important, enabling Tribes to ensure that their often-traumatized youth receive proper assessment and treatment that is attentive to the resources and healing potential of Tribal cultures. Intergovernmental cooperation for juvenile justice takes different forms for the Tribes subject to Federal authority as compared with Tribes under P.L. 83-280, settlement acts, or other forms of State jurisdiction.

Where Federal authority exists, there is far less collaboration with Tribes than with State governments. In fact, the very structure of Federal juvenile jurisdiction builds in deference to States—indeed to the District of Columbia and to all U.S. territories and possessions—but not to Tribes. For example, if a juvenile in Los Angeles commits a Federal handgun crime, the Federal Delinquency Act, 18 U.S.C. § 5032, provides that Federal prosecutors may not proceed against the juvenile *unless they certify to the Federal District Court, after investigation*, that one of three conditions exists: 1) California juvenile courts do not have jurisdiction or refuse to assume jurisdiction over the juvenile, 2) California does not “have available programs and services adequate for the needs of juveniles,” or 3) the offense is a violent felony or a specified drug offense in which there is “a substantial Federal interest.” Under current law, the U. S. territory of American Samoa is entitled to the same deference as the State of California and every other State, but the Navajo Nation and the Rosebud Sioux Tribe are not.

The Federal Delinquency Act’s provisions limiting Federal prosecution promote Federal consultation and coordination with every other form of government except for Native nations. That disparity must end. Some U.S. Attorney’s offices, such as in South Dakota, have shown that Federal-Tribal cooperation on juvenile matters can be established and can be successful.

The Tribal Youth Pretrial Diversion Program, implemented by U.S. Attorney Brendan Johnson of the District of South Dakota on a trial basis on the Rosebud Indian Reservation, allows qualifying youth to be sentenced in Tribal court instead of Federal court. If the juvenile successfully completes the Tribal program ordered by the Tribal judge, the juvenile is not prosecuted in Federal court.⁶⁷ The Commission recommends that this type of diversion program should be mandatory in all Federal judicial districts with willing Tribal court partners, even though diversion will only be needed for a small number of Indian country cases remaining within Federal juvenile jurisdiction assuming the other recommendations in this report are adopted. For example, a juvenile’s designated Federal drug offense of general applicability or an offense by a juvenile whose Tribe does not have its own juvenile justice system would be diverted to Tribal court.

Tribal-Federal cooperation is also imperative when a Federal prosecutor considers making a motion to transfer a juvenile offender for trial as an adult. Transfer catapults Tribal youth into the realm of harsher sentences and detention conditions, and removes them from the protections of juvenile proceedings, including confidentiality. In recent years, very few Indian country juvenile cases appear to be transferred for adult prosecution. Between 2004 and 2008, the number of Indian country juveniles referred as adults to BOP dropped from a high of 54 to 12.⁶⁸ It is too soon, however, to discern whether this decline represents a long-term trend. Furthermore, the fate of each individual Tribal child matters.

Under the Federal Juvenile Delinquency Act,⁶⁹ transfer is mandatory for certain juvenile repeat offenders. In addition, if a child has passed a 15th birthday and has committed a crime of violence or one of several named drug and handgun offenses, the court has discretion to grant a transfer, taking into account a variety of considerations such as the juvenile's prior record and the juvenile's level of intellectual development and psychological maturity. Since 1994, in a narrower subset of violent crimes and crimes committed with a handgun, transfer is discretionary if the offense was committed after the child's 13th birthday; but Congress also provided that transfers for the juveniles age 13 and 14 for Indian country offenses will be allowed only if the juvenile's Tribe has elected to have Indian youth that age transferred.⁷⁰ To date, there is apparently only one report of a Tribe having allowed adult prosecutions of 13- and 14-year olds.⁷¹

Tribal control over the decision to transfer a juvenile for adult prosecution has the salutary effect of encouraging Tribal-Federal cooperation. Under the statute, however, Tribes lose their protective control once the juvenile turns 15, when the range of offenses that can trigger a transfer expands. That age cut-off is arbitrary. Considering the deeply rooted trauma that Tribal youth have experienced and the preference for tribally developed responses to that trauma, Tribes should be able to prevent all transfers of juveniles to adult status for all of the offenses specified in the Juvenile Delinquency Act and for juveniles of all ages, so long as Indian country is the basis for Federal jurisdiction.⁷² If, as recommended above, Federal juvenile authority is to be restricted when the Tribe is willing to assert jurisdiction, the number of cases eligible for transfer will likely be small, and few potential transfers will be affected.

For Indian country offenses under 18 U.S.C. § 1152 and § 1153, this report's recommendations on jurisdiction (Chapter 1) would afford Tribes the option to eliminate Federal juvenile jurisdiction altogether or, alternatively, to consent to any such Federal prosecutions should they wish to retain Federal jurisdiction over juvenile offenses. For Tribes that choose not to exercise these options and for Federal offenses of general application committed within Indian country, the following recommendations will create structures and incentives promoting greater Tribal-Federal cooperation with respect to juveniles.

6.9: *The Federal Delinquency Act, 18 U.S.C. § 5032, which currently fosters Federal consultation and coordination only with States and U.S. territories, should be amended to add “or tribe” after the word “state” in subsections (1) and (2).*⁷³

6.10: *The Federal Delinquency Act, 18 U.S.C. § 5032, should be amended so that the Tribal governmental consent to allow or disallow transfer of juveniles for prosecution as adults applies to all juveniles subject to discretionary transfer, regardless of age or offense.*

6.11: *Federal courts hearing Indian country juvenile matters should be required to establish pretrial diversion programs for such cases that allow sentencing in Tribal courts.*

Tribes subject to State criminal and juvenile jurisdiction under P.L. 83-280, settlement acts, and other Federal statutes must contend with State juvenile justice systems that typically take no special account of the often-traumatic experiences of Tribal youth or the cultural and other resources Tribes might be able to contribute toward accountability, treatment, and rehabilitation. Indeed, State justice systems never even record the Tribal member status or Indian country location associated with juvenile or other offenses, making it impossible for Tribes to hold the State systems accountable for how their children are treated. These same Tribes have also long complained that State justice systems provide inadequate service to reservation communities, while discriminating against Tribal members when they do appear as defendants or victims.⁷⁴ To make matters worse, the P.L. 83-280 and other State jurisdiction Tribes also operate without funding from the U.S. Department of the Interior for their policing, court systems, and detention, because of the Department’s policies denying financial support to Tribes under State jurisdiction.⁷⁵

Under current Federal law, Tribes are powerless to extricate themselves from State criminal jurisdiction—a process known as retrocession—unless the State agrees.⁷⁶ Both in this chapter and Chapter 1 (Jurisdiction: Bringing Clarity Out of Chaos), this report recommends that Congress alter that situation, and give Tribes the option to effect retrocession on their own. However, not every Tribe will have the capacity or the desire to carry out retrocession, either immediately or in the future.

Even if the recommendations in this report for strengthening Tribal justice are implemented (Chapter 3), and Tribes under State jurisdiction receive enhanced resources, some Tribes may still be too small to support a separate justice system. For those Tribes remaining under State jurisdiction, Tribal-State cooperation can greatly improve juvenile justice by providing notice to Tribes when their children enter the State system and engaging Tribes in crafting and implementing appropriate responses. Indeed, Tribes and local governments in several P.L. 83-280 States have already begun to implement cooperative measures with positive results.

In the P.L. 85-280 State of Oregon, for example, many Tribes and the State have a memorandum of agreement to inform the Tribes if one of their juveniles enters the custody of Oregon Youth Authority.⁷⁷ The Oregon Youth Authority (OYA) has been actively engaging Tribal governments in four main ways: 1) individually, through government-to-government relationships, as established in a memorandum of understanding with each Tribe; 2) collectively, through the OYA Native American Advisory Committee; 3) collaboratively, through implementing and coordinating culturally relevant treatment services for Native American youth in OYA custody; and 4) through the coordination and chairing of Public Safety Cluster meetings.⁷⁸

OYA has acknowledged that “[r]esearch shows that the most effective way to encourage youth to lead crime-free lives is by providing the appropriate combination of culturally specific treatment and education.”⁷⁹ The Youth Authority and the Tribes have set up a protocol for letting each other know when youth have gone into OYA jurisdiction, and they also discuss together how to plan for work with each youth and also for reentry.⁸⁰ A designated Tribal liaison represents OYA in Tribal relationships, and Oregon Tribes identify a contact person to begin communications between OYA and the Tribes. Although this arrangement introduces the Tribe into a juvenile’s proceeding after rather than before disposition, the relationship does allow Tribes to provide input throughout the entire commitment process and integrate their youth back into their Tribal community. The notice and information sharing aspects of the agreements are key to the success of this practice in allowing for more Tribal participation in the lives of their youth.

Another promising strategy for Tribal-State cooperation, coordinated exercise of concurrent jurisdiction and diversion of juvenile cases from State to Tribal court, involves the Yurok Tribe and Del Norte County in California, another P.L. 85-280 State.⁸¹ The Yurok Tribal Court and Del Norte County have negotiated a memorandum of understanding that provides for the two jurisdictions to coordinate disposition of juvenile cases, allowing for a joint determination to be made about which jurisdiction will handle the primary disposition of a youth’s case. Information is shared between the two court systems, and a procedure has been established for postponement of cases pending in county court in situations where the Tribal court has assumed jurisdiction and the youth completes an accountability agreement and any other conditions ordered by the Tribal court. This MOU acknowledges both concurrent jurisdiction and the possibility of the Tribal court petitioning for transfer of cases from the county.⁸² As one description of this cooperative arrangement notes, “[b]oth court systems have acknowledged that the Tribal court will order culturally appropriate education and case plan activities, including a restorative justice component, for all juveniles.”⁸³

Two key mechanisms of enhanced Tribal-state cooperation are notice to Tribes when their children enter State juvenile justice systems

and opportunities for Tribes to participate more fully in determining the disposition of juvenile cases. Notice, of course, is essential if participation is to occur. If the State is exercising juvenile jurisdiction over an act that would not be a crime if committed by an adult, such as truancy or underage drinking, notice and other requirements from the Indian Child Welfare Act apply. For a P.L. 83-280 or other State jurisdiction Tribe, that means the State must inquire into the child's Tribal status, and the Tribe will be notified and given an opportunity to intervene if the child is at risk of entering foster care.⁸⁴ Further, even though jurisdiction over Indian juveniles living in Indian country is concurrent under P.L. 83-280 and ICWA, the Tribe will be able to transfer the case from State to Tribal court absent parental objection or good cause to the contrary.⁸⁵ In contrast, if the State is exercising juvenile jurisdiction over an act that *would* be a crime if committed by an adult, none of these ICWA protections will be available for the Tribe.⁸⁶

That double standard must fall if this Commission's recommendations regarding local Tribal control are accepted. The great vulnerability of Tribal youth, the profound interest of Tribal communities in the welfare of their children, and the benefits of incorporating Tribal accountability and healing measures into the treatment of juveniles from those communities all point toward one conclusion: ICWA notice, intervention, and transfer measures should apply to State court proceedings involving actions of Tribal juveniles that take place within that Tribe's Indian country, whether or not the offense would be criminal if committed by an adult. Once this principle is established, further cooperative measures, such as diversion programs from State to Tribal court, will be more likely to take root. The Commission's recommendation concerning ICWA reflects these conclusions.

6.12: The Indian Child Welfare Act⁸⁷ should be amended to provide that when a State court initiates any delinquency proceeding involving an Indian child for acts that took place on the reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all other Indian children involved in State delinquency proceedings, ICWA should be amended to require notice to the Tribe and a right to intervene.

CONCLUSION

There is perhaps no more telling indication of how mainstream society values—or rather devalues—Native Americans and Alaska Natives who live and work on Tribal homelands than how existing Federal and State laws and institutions treat Native youth. In unanimously proposing these far-reaching recommendations to restructure the current system and to accelerate and incentivize their replacement by locally based Tribal systems, the Indian Law and Order Commission paid particular attention not only to statements by Tribal leaders, but also to the testimony of Federal and State officials charged with carrying out—and in many cases,

propping up—the existing juvenile justice system. The Commission was struck by the official statements of U.S. Attorneys, as well as their informal, and often passionate comments to Commission members.

Given the extraordinary dysfunction of the prevailing juvenile justice system that is supposed to serve and protect Indian country and its citizens, including but not limited to the 1938 Juvenile Delinquency Act, it is perhaps not surprising that some of the most informed and impassioned pleas to reform it come from Federal prosecutors and, albeit quietly, U.S. District Court judges and magistrate judges.

A consistent complaint is the inherent unfairness of the system, which often imposes harsher sentences on Native juveniles simply because they happen to be Native and have committed offenses on Tribal homelands rather than off-reservation. A recent example involves *Graham v. Florida*, where the U.S. Supreme Court declared that State courts may not sentence juvenile offenders to life imprisonment without parole; to do so violates the Eighth Amendment to the U.S. Constitution.⁸⁸ Because *Graham* applies only to such sentences imposed by State courts, several Federal prosecutors observed that it does not benefit Native American juveniles who have been sentenced by Federal courts, sentenced as adults, and are incarcerated by the Federal Bureau of Prisons.

Indeed, shortly after *Graham* was announced, a divided Federal appeals court panel upheld a 576 month (48 year) Federal prison sentence for a Native American juvenile who was 17 years old at the time he committed a homicide. In that case, *United States v. Boneshirt*,⁸⁹ two judges of the U.S. Court of Appeals for the Eighth Circuit ruled that notwithstanding *Graham*, a 576-month sentence, with no possibility for parole, was not the equivalent to an impermissible life sentence. This prompted the dissenting judge, who observed that the average life expectancy for Native American males in the United States is just 58 years, to remark: “Even if he earns all his good time credit, which the district court was not optimistic about, he will still serve more than 40 years in prison. The district court anticipated Boneshirt would be an old man when he was released, but in reality he may be a dead man.”⁹⁰

Given the prevailing system of injustice toward Native young people, all U.S. citizens, no matter where they live and work, have a stake in ensuring that meaningful change happens soon. After all, we’re talking about our children. No one and nothing on this earth is more important.

ENDNOTES

¹ *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence*, 52 (2012) (written testimony of Ivy Wright-Bryan, National Director of Native American Mentoring, Big Brothers Big Sisters of America).

² *Id.*

³ *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence*, 108 (2012) (written testimony of Elsie Boudrou, Licensed Master Social Worker at Alaska Native Justice Center); .see also Maria Yellow Horse Brave Heart and Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN AND ALASKA NATIVE MENTAL HEALTH RESEARCH 56 (discussing the impact of intergenerational trauma on Native peoples in the United States).

⁴ Neelum Arya and Addie Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems*, at 4 (5 Campaign for Youth Justice Policy Brief 2008), available at <http://ssrn.com/abstract=1892959>.

⁵ *Id.* at 5.

⁶ *Id.* at 4.

⁷ Ryan Seelau, *Regaining Control Over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice That Targeted Native American Youth*, 37 AM. INDIAN L. REV. 63, 69 (2012), available at <http://libredeterminacion.org/proldi/imagenes/lawReview-remaking.pdf>.

⁸ *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence*, 52 (2012) (written testimony of Carole Justice) (quoting anonymous Arapaho youth to illustrate the level of violence Native children are exposed to on the Wind River Indian Reservation).

⁹ *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence*, 108-11 (2012) (written testimony of Gil Vigil, National Indian Child Welfare Association Board Member) (discussing trauma and youth exposure to violence in Indian Country); see also Dolores Subia BigFoot et al., *Trauma Exposure in American Indian/Alaska Native Children 1-4* (Indian Country Child Trauma Center 2008), available at <http://www.theannainstitute.org/American%20Indians%20and%20Alaska%20Natives/Trauma%20Exposure%20in%20AIAN%20Children.pdf>.

¹⁰ *Id.* at 2.

¹¹ Michelle Sarche and Paul Spicer, *Poverty and Health Disparities for American Indian and Alaska Native Children: Current Knowledge and Future Prospects*, 1136 Ann N Y Acad Sci. 126 (2008) at ¶4, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2567901/>; see also BigFoot et al., *supra* note 9 (providing similar statistical data on disparities experienced by Native youth).

¹² Bigfoot et al., *supra* note 9.

¹³ Seelau, *supra* note 7 at 72.

¹⁴ Sarche and Spicer, *supra* note 11.

¹⁵ *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence*, 61 (2012) (written testimony of Mato Standing-High, Rosebud Indian Reservation Attorney General).

¹⁶ See *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in*

Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence, 94 (2012) (written testimony of Lyle Claw, Founder of CLAW Inc.) (indicating that in rural communities served by CLAW Inc., “[i]t is not uncommon for 90-98 percent of [Native] youth to acknowledge their exposure to domestic violence”).

¹⁷ Testimony of Carole Justice, *supra* note 8, at 44.

¹⁸ Testimony of Mato Standing-High, *supra* note 15, at 61.

¹⁹ See Testimony of Mato Standing-High, Indian Law and Order Commission Listening Session with Tribal Representatives in Santa Ana Pueblo, NM (Dec. 13, 2011), on file with the Commission.

²⁰ Written Testimony of Elsie Boudrou, *supra* note 3, at 27.

²¹ Robert L. Listenbee, Jr. et al., Report of the Attorney General's National Task Force on Children Exposed to Violence 31 (2012).

²² *Id.* at 27; see also U.S. Dept. of Justice, Defending Childhood Fact Sheet, 2010 (supporting the proposition that children exposed to violence experience harmful and debilitating mental, physical, and emotional effects).

²³ David Finkelhor et al., *Children's Exposure to Violence: A Comprehensive National Study*, U.S. Dept. of Justice Juvenile Justice Bulletin (Oct. 2009) at 3, available at <https://www.ncjrs.gov/pdffiles1/ojdp/227744.pdf>.

²⁴ Written Testimony of Gil Vigil, *supra* note 9, at 109; see also Yellow Horse Brave Heart and DeBruyn, *supra* note 3, at 60 (discussing the impact of intergenerational trauma on Native people in the U.S.).

²⁵ 25 U.S.C. § 1901 et seq.

²⁶ Arya and Rolnick, *supra* note 4, at 24 (“Approximately 300 to 400 juveniles under the age of 18 are arrested each year under the federal system, which is about 2 percent or less of the total arrests under the federal system.”).

²⁷ WILLIAM ADAMS ET AL., URBAN INSTITUTE JUSTICE POLICY CENTER, TRIBAL YOUTH IN THE FEDERAL JUSTICE SYSTEM, (2011) at viii, available at <http://www.urban.org/uploadedpdf/412369-Tribal-Youth-in-the-Federal-Justice-System.pdf>.

²⁸ Arya and Rolnick, *supra* note 4, at 26.

²⁹ Reported at a meeting of the Indian Law and Order Commission with personnel from the Department of the Interior, Bureau of Indian Education, Arlington, VA, March 6, 2012.

³⁰ Testimony of Chori Folkman, Hearing before the Indian Law and Order Commission, Tulalip Indian Reservation, WA (Sept. 7, 2011), transcript on file with the Commission. (See also endnote 65.)

³¹ William Adams et al., *supra* note 27, at viii.

³² Arya and Rolnick, *supra* note 4, at 25.

³³ See NELL JESSUP NEWTON ET AL., EDS., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[4] (2012).

³⁴ *In re W.B. Jr.*, 55 Cal.4th 30, 57-58 (Cal. 2012).

³⁵ Arya and Rolnick, *supra* note 4, at 20.

³⁶ *Id.* at 24.

³⁷ Federal Justice Statistics Program: Federal Bureau of Prisons' data file (entry cohort), annual, 1999-2008; see also William Adams et al., *supra* note 27.

³⁸ Jon Gustin, “Native American Juveniles in Custody of Bureau of Prisons.” Communication to Jeff Davis, Executive Director, Indian Law and Order Commission, Nov. 6, 2012. Informa-

tion request per 25 U.S.C.A. § 2812(g)(3)(A). Email response.

⁵⁹ *Id.*

⁴⁰ See *Defending Childhood Initiative Public Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities Before Attorney General's National Task Force on Children Exposed to Violence*, 71 (2012) (written testimony of Janell Regimbal) (“Even though Native American Youth comprise only 1.9 percent of [North Dakota's] population and 8.9 percent of the total youth state population, they represented 43 percent of the March 1, 2011 census of North Dakota Youth Correctional Center, housing youth from across the state and considered the most secure environment for corrections placements.”).

⁴¹ NATIONAL CENTER FOR JUVENILE JUSTICE, CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT 1997-2010 (2011), available at <http://www.ojjdp.gov/ojstatbb/ezacjrp/>; see also M. Sickmund, T.J. Sladaky, W. Kang, and C. Puzanchera, *Easy Access to the Census of Juveniles in Residential Placement* (2011), <http://www.ojjdp.gov/ojstatbb/ezacjrp/>.

⁴² OREGON YOUTH AUTHORITY, 2012 GOVERNMENT-TO-GOVERNMENT REPORT ON TRIBAL RELATIONS: SUPPORTING THE RIGHTS AND NEEDS OF OREGON'S TRIBAL YOUTH 3 (2012), http://www.oregon.gov/oia/reports/SB770Report_2012.pdf

⁴³ AMERICAN CORRECTIONAL ASSOCIATION, ADULT AND JUVENILE CORRECTIONAL DEPARTMENTS, INSTITUTIONS, AGENCIES, AND PROBATION AND PAROLE AUTHORITIES (2008).

⁴⁴ William Adams et al., *supra* note 27, at 24.

⁴⁵ H.R. Rep. No. 95-1386, at 9 (1978).

⁴⁶ 18 U.S.C. § 1152.

⁴⁷ 18 U.S.C. § 1153, also known as the Indian Country Crimes Act.

⁴⁸ 18 U.S.C. § 3598.

⁴⁹ The U. S. Attorney for the District of Wyoming corroborated this view, while lamenting the fact that once local Tribal youth were routed into the Federal system, they could wind up in placements as far away as the California Youth Authority. Testimony of Christopher “Kip” Crofts, Hearing before the Indian Law and Order Commission, Wind River Reservation, WY (May 23, 2012), on file with the Commission. Further corroboration can be found in William Adams *supra* note 27, at 26.

⁵⁰ See Kelsey Dayton, *Wind River Tribal Youth Program Blends Prevention, Treatment and Tribal Tradition*, CASPER. STAR-TRIB. (April 1, 2012).

⁵¹ The two main programs available through the U. S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP) are the Tribal Youth Program and the Tribal Juvenile Accountability Discretionary Grant Program. These programs make grants to federally recognized tribes for an array of activities, including delinquency prevention and intervention, juvenile justice system improvement, building or improving detention facilities, and specialized mental health and substance abuse services for Tribal youth and families. SAMHSA within the Department of Health and Human Services makes grants available to Tribes for youth suicide prevention, and opens many of its general substance abuse prevention and treatment program to Tribes. However, it does not target Tribal youth specifically. More information on these programs is available on the OJJDP website, <http://www.ojjdp.gov/index.html> and the Substance Abuse and Mental Health Administration Website, <http://www.samhsa.gov/grants/>.

⁵² Testimony of Miskoo Petite, Hearing before the Indian Law and Order Commission, Rosebud Reservation, SD at 73 (May 16, 2012), on file with the Commission. Similar concerns were expressed about successful, but temporary grants for child advocate and mental health services.

⁵³ William Adams et al., *supra* note 27, at ix.

⁵⁴ CAROLE GOLDBERG, DUANE CHAMPAGNE, AND HEATHER SINGLETON, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2008) at 21-22, available at

<https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

⁵⁵ See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, B.1 (1979); *In re Nikki R.*, 131 Cal. Rptr. 2d 256 (Ct. App. 2005) (requiring juvenile court to oversee adequacy of inquiries).

⁵⁶ Robert L. Listenbee, Jr. et al., *supra* note 21, at 179.

⁵⁷ *Id.* at 171, 173. The Report further states: “Children exposed to violence, who desperately need help, often end up alienated. Instead of responding in ways that repair the damage done to them by trauma and violence, the frequent response of communities, caregivers, and peers is to reject and ostracize these children, pushing them further into negative behaviors. Often the children become isolated from and lost to their families, schools, and neighborhoods and end up in multiple unsuccessful out-of-home placements and, ultimately, in correctional institutions.” *Id.* at 172.

⁵⁸ Testimony of Bart Lubow, Hearing before the Indian Law and Order Commission, Nashville, TN at 94 (July 20, 2012), on file with the Commission.

⁵⁹ *Id.* at 95. This critique of juvenile detention is based on long-term research across 175 sites in 38 states.

⁶⁰ “The unfortunate and often forgotten reality is that there is an epidemic of violence and harm directed toward this very vulnerable population.... American Indian/Alaska Native children and youth experience an increased risk of multiple victimizations,” she said. “Their capacity to function and to regroup before the next emotional or physical assault diminished with each missed opportunity to intervene. These youth often make the decision to take their own lives because they feel a lack of safety in their environment. Our youth are in desperate need of safe homes, safe families and safe communities.” *Indian Youth Suicide Prevention Act of 2009: Hearing Before the S. Comm. On Indian Affairs* (2009) (Testimony of Dolores Subia BigFoot, Director of Indian Country Trauma Center, University of Oklahoma).

⁶¹ Testimony of Miskoo Petite, Facility Administrator for the Rosebud Sioux Tribe Correction Services, Hearing before the Indian Law and Order Commission, Rosebud Reservation, SD at 75 (May 16, 2012).

⁶² See testimony of Honorable Martha Vasquez, Judge for the United States District Court, District of New Mexico, before the Indian Law and Order Commission, Pojoaque Pueblo, NM (April 19, 2012).

⁶³ Robert L. Listenbee, Jr. et al., *supra* note 21, at 179; Testimony of Bart Lubow, *supra* note 57, at 102-103.

⁶⁴ Also known as Courts of Indian Offenses, CFR Courts are Federal courts for Tribes that lack their own judiciaries and responsible for misdemeanor enforcement pursuant to 25 CFR Part 11.

⁶⁵ Testimony of Janelle Doughty, Hearing before the Indian Law and Order Commission, Rosebud Reservation, SD at 105 (May 16, 2012), on file with the Commission. Ms. Doughty further testified that the Ute Mountain Ute Tribe has stepped forward to provide services to its children, but children from other tribes incarcerated at this Federal facility do not receive any education or other services. (See also endnote 29.)

⁶⁶ Duane Champagne and Carole Goldberg, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280 at 153-161(2012).

⁶⁷ Testimony of Brendan Johnson, Hearing before the Indian Law and Order Commission, Rosebud Reservation, SD at 133 (May 16, 2012), on file with the Commission. See also Executive Office of the United States Attorneys, Outreach to Indian Country, Empowering Native American Women and Youth: *Outreach Events and Wind River Indian Reservation and Wyoming Indian High School*, available at http://www.justice.gov/usao/briefing_room/vw/ic.html. See also

⁶⁸ See William Adams et al., *supra* note 27, at 65.

⁶⁹18 U.S.C. § 5032.

⁷⁰ See *Crime Prevention and Criminal Justice Reform Act of 1994: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Jud. Comm.* (February 22, 1994) (Written Testimony of Helen Elaine Avalos, Assistant Attorney General, Navajo Department of Justice, on Behalf of Peterson Zah, President of the Navajo Nation) (supporting a Tribal election provision for juvenile transfers, enhanced death penalty provisions, and other enhanced sentencing measures in the Crime Prevention and Criminal Justice Reform Act, due to disproportionate impact on Tribal members and infringement on Tribal sovereignty).

⁷¹ Arvo Mikkonen, *Federal Prosecution of Juveniles*, 58 United States Attorneys' Bulletin No. 4, July, 2010, at 57.

⁷² This power could be asserted for some or all of the offenses listed in 18 U.S.C. § 5032.

⁷³ The new language for 18 U.S.C. § 5032 would read: "A juvenile alleged to have committed an act of juvenile delinquency, ... shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that

(1) the juvenile court or other appropriate court of the *State or Tribe* does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency,

(2) *the State or Tribe* does not have available programs and services adequate for the needs of juveniles,..."

⁷⁴ See Duane Champagne and Carole Goldberg, *supra* note 65, at 67-111.

⁷⁵ *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell* at 1, 13 Cal. Daily Op. Serv. 9855 (9th Cir. Sept. 4, 2013).

⁷⁶ See Duane Champagne and Carole Goldberg, *supra* note 65, at 165-191.

⁷⁷ OREGON YOUTH AUTHORITY, 2012 GOVERNMENT-TO-GOVERNMENT REPORT ON TRIBAL RELATIONS: SUPPORTING THE RIGHTS AND NEEDS OF OREGON'S TRIBAL YOUTH, available at http://www.oregon.gov/oya/reports/SB770Report_2012.pdf

⁷⁸ *Id.* at 2.

⁷⁹ Oregon Youth Authority, *2012 Government-to-Government Report on Tribal Relations: Supporting the Rights and Needs of Oregon's Tribal Youth 1* (2012) http://www.oregon.gov/oya/reports/SB770Report_2012.pdf

⁸⁰ Testimony of Stephanie Striffler, Hearing before the Indian Law and Order Commission, Portland, OR (Nov. 2, 2011), on file with the Commission.

⁸¹ Press release, Coordinated Adult and Juvenile Probation Parties: Yurok Tribal Court and Counties of Del Norte and Humboldt, California, <http://www.courts.ca.gov/documents/Tribal-Resources-JuvDelAgreement-Yurok.pdf>.

⁸² Tribal Law and Policy Institute, *Promising Strategies: Tribal-State Court Relations* (March 2013) 35-39, http://www.walkingoncommonground.org/files/TLPI%20Promising%20Strategies%20Tribal-State%20Court%20Relations_FINAL_Updated%208-15-13.pdf.

⁸³ *Id.* at 37.

⁸⁴ See 25 U.S.C. §§ 1911-1912; *In re W.B. Jr.*, 55 Cal.4th 30 (Cal. 2012).

⁸⁵ See 25 U.S.C. § 1911(b); *In re M.S.*, 40 Cal. Rptr. 3d 439 (Ct. App. 2006).

⁸⁶ See 25 U.S.C. § 1903(1) (definition of "child custody proceeding"). California law currently goes further than ICWA, and requires inquiry into the child's Indian status for all delinquency proceedings where the child is at risk of entering foster care, even if the underlying offense would be a crime if committed by an adult. Cal. Welfare & Institutions C., § 224.3(a). However, California courts have refused to interpret state law as applying any other ICWA

protections in such cases, such as the right of the Tribe to notice and to intervene. In re W.B. Jr., 55 Cal.4th 30, 55 (Cal. 2012).

⁸⁷25 U.S.C. § 1901 *et seq.*

⁸⁸560 U.S. 48 (2010).

⁸⁹*United States v. Boneshirt*, 662 F.3d 509 (8th Cir. 2011).

⁹⁰*Id.* at p. 23 (Judge Bright, dissenting as to the sentence).

APPENDIX A

TRANSMITTAL LETTER



Indian Law & Order
COMMISSION

To the President of the United States, the Speaker of the House of Representatives, and the President Pro Tempore of the Senate:

Pursuant to the Tribal Law and Order Act of 2010 (Public Law 111-211), in accordance with Title II, Section 235, I am pleased to transmit the report of the Indian Law and Order Commission.

This report includes:

- (1) A detailed statement of the findings and conclusions of the Commission; and
- (2) The unanimous recommendations of the Commission for such Federal legislative and administrative actions as the Commission considers to be appropriate, along with proposed changes in Federal judicial policy and suggestions for the development of uniform State and Tribal laws and best practices.

Respectfully submitted,

Troy A. Eid
Chairman
Indian Law and Order Commission
Denver, CO
November 2013

ABOUT THE INDIAN LAW AND ORDER COMMISSION

The Tribal Law and Order Act (TLOA), which passed the Congress with bipartisan support, was signed into law by President Obama on July 29, 2010. The law (P.L. 111-211) makes Federal agencies more accountable for their work in Indian country and provides greater freedom for Tribes to design and manage their own criminal justice systems. In addition, TLOA created the Indian Law and Order Commission, an independent, all-volunteer advisory group, to address the greatest challenges in securing equal justice for Native Americans living and working on Indian lands.

TLOA directed the Commission to do a comprehensive study of judicial and law enforcement systems in Indian country and to report back to the President and Congress with specific proposals to make Indian country safer and more just. The six areas of special focus for the report are:

1. Jurisdiction
2. Alaska
3. Strengthening Tribal Justice
4. Intergovernmental Cooperation
5. Detention and Alternatives to Incarceration
6. Juvenile Justice

From 2011 to 2013, to gain insight into these and many other systemic challenges, the Indian Law and Order Commission gathered input and testimony from Indian Tribes and from State and Federal stakeholders to assist in developing recommendations for lasting public policy reform. The Commission conducted regional public hearings and visits with Tribes in the lower 48 states and also spent several weeks visiting villages in the interior, far north, southeast, and southwest regions of Alaska. Through these hearings and visits, the Commission was seeking to gain an in-depth understanding both of nationwide issues and community-specific, day-to-day safety and justice concerns. During their travels, commissioners visited not only with Tribal leadership, but also heard the voices of the youth and elders. Individual commissioners and staff toured detention, police, and court facilities across Indian country and heard directly from individuals working in those settings.

The Commission also heard from community leaders regarding justice approaches that currently work well on a local level. Key to this outreach was the Tribal Advisory Committee, an advisory group of 24 members representing each region of the country. The Committee was instrumental in assisting the Commission by providing public hearing testimony, submitting written testimony, and identifying other experts and resources in the fields of Tribal justice systems, crime prevention, and victim services.

Throughout the process, the Indian Law and Order Commission researched previous reports, data sources, and other materials relevant to Indian country criminal justice. The Commission also encouraged and welcomed written comments from Federal, State, and Tribal officials, community members, stakeholders, and the general public through the Commission's website. All comments were made a part of the official record.

COMMISSIONER BIOGRAPHIES



HON. TROY A. EID

The Honorable Troy A. Eid was nominated by President George W. Bush and confirmed by the Senate to serve as the United States Attorney for the District of Colorado, a position he held from 2006-09. Mr. Eid was appointed to the Indian Law and Order Commission by U.S. Senate Majority Leader Harry Reid, and he was unanimously selected by his fellow commissioners as chair of the Commission. Mr. Eid is currently principal shareholder with the Denver office of Greenberg Traurig LLP, where he co-chairs the firm's Indian law practice. He also serves as an adjunct professor at the University of Colorado School of Law, teaching in the American Indian Law Program. Mr. Eid's recent honors include the 2012 Member of the Year Award from the Navajo Nation Bar Association, the largest legal organization that directly serves an Indian nation. He clerked for Judge Edith H. Jones of the U.S. Court of Appeals for the Fifth Circuit. From 1999-2003, Mr. Eid served in the cabinet of Colorado Governor Bill Owens. Mr. Eid holds an A.B. from Stanford University and a J.D. from the University of Chicago Law School, where he was an editor of the Law Review.



AFFIE ELLIS

Affie Ellis, a member of the Navajo Nation, is president of Ellis Public Affairs, a public and government relations firm based in Cheyenne, WY. Ms. Ellis was appointed to the Commission by U.S. Senate Minority Leader Mitch McConnell. She previously litigated as an assistant attorney general for the State of Wyoming, representing and advising the Governor and multiple state agencies on natural resource and Indian law. Ms. Ellis is an adjunct professor in the American Indian Studies Department at the University of Wyoming, where she focuses on the intersection of constitutional law, congressional action, and Indian policy.

Formerly, Ms. Ellis worked as a policy advisor for U.S. Senator Craig Thomas in Washington, DC, advising on natural resources, public lands, and American Indian issues. While in Washington, she also was appointed by President George W. Bush to serve as the director of congressional and public affairs for the National Indian Gaming Commission, an independent regulatory agency that oversees all Indian gaming. Ms. Ellis holds a B.S. from the University of Wyoming and a J.D. from the University of Colorado.



TOM GEDE

Tom Gede is a principal with Bingham Consulting Group and of counsel at Bingham McCutchen LLP. U.S. Speaker of the House John Boehner appointed Mr. Gede to the Commission. He previously served as executive director of the Conference of Western Attorneys General. From 1987 to 2000, Mr. Gede practiced as a special assistant attorney and deputy attorney general in the criminal division and government law sections of the California Office of the Attorney General. Since 2000, Mr. Gede has been an adjunct professor of Federal Indian law at the University of the Pacific-McGeorge School of Law. He is vice-chair of the American Bar Association's annual Water Law Conference and a member of the board of directors of the University of California Hastings College of the Law. Mr. Gede holds a B.A. from Stanford University and a J.D. from the University of California Hastings College of the Law.



**HON. CAROLE
GOLDBERG**

Professor Goldberg serves as the Jonathan D. Varat Distinguished Professor of Law at the UCLA School of Law and UCLA's Vice Chancellor for Academic Personnel. She also is a Justice of the Court of Appeals of the Hualapai Tribe in Arizona. President Barack Obama appointed Professor Goldberg to the Commission. Professor Goldberg was the principal investigator for several large grants from the National Institute of Justice to study the administration of criminal justice in Indian country. She is the author of numerous books and articles in the fields of Federal Indian law and Tribal law. In 2006, she was the Oneida Indian Nation Visiting Professor of Law at Harvard Law School. In 2013 she received the Lawrence Baca Lifetime Achievement Award from the Federal Bar Association's Indian Law Section. Professor Goldberg holds a B.A. from Smith College and a J.D. from Stanford University.



**HON. STEPHANIE
HERSETH SANDLIN**

The Honorable Stephanie Herseth Sandlin represented the State of South Dakota for four terms in the U.S. House of Representatives, where she served on the Agriculture Committee, Natural Resources Committee, and Veterans' Affairs Committee, as well as on the Select Committee on Energy Independence and Global Warming. While in Congress, she introduced and championed the Tribal Law and Order Act. She was appointed to the Commission by U.S. House Minority Leader Nancy Pelosi. Ms. Herseth Sandlin is currently general counsel and vice president of corporate development for Raven Industries, Inc., headquartered in Sioux Falls, SD. She was a clerk for the U.S. Court of Appeals for the Fourth Circuit and the U.S. District Court for the District of South Dakota. Ms. Herseth Sandlin holds both a B.A. and J.D. from Georgetown University.



**HON. JEFFERSON
KEEL**

The Honorable Jefferson Keel, Lieutenant Governor of the Chickasaw Nation and President of the National Congress of American Indians, is committed to the service of Indian people. U.S. Senate Majority Leader Harry Reid appointed Lt. Governor Keel to the Commission. He serves on several national boards and committees, including the Board of Regents at Bacone College and the Board of Directors of East Central University Foundation. He is often called upon to testify before Congress and to assist Tribes and Tribal organizations on a variety of actions and initiatives. He is a retired U.S. Army officer with over 20 years active duty service. His service included combat duty as an infantryman in Vietnam, where he earned numerous awards and decorations, including two awards of the Bronze Star with the “V” device for valor and two awards of the Purple Heart. Lt. Governor Keel holds a B.S. from East Central University and an M.S. from Troy State University.



**HON. EARL
POMEROY III**

The Honorable Earl Pomeroy is a senior counsel with Alston & Bird LLP. He was appointed to the Commission by U.S. House Minority Leader Nancy Pelosi. Mr. Pomeroy represented North Dakota in the U.S. House of Representatives from 1993 to 2011, where he served on the Agriculture Committee and the Ways and Means Committee. Mr. Pomeroy started his career in private legal practice. From 1981 to 1985, he was a member of the North Dakota House of Representatives. He was the North Dakota State Insurance Commissioner from 1985 to 1992. Mr. Pomeroy received his B.A. from the University of North Dakota, attended University of Durham (England), and earned a J.D. from the University of North Dakota.



**HON. THERESA M.
POULEY**

The Honorable Theresa M. Pouley is a member of the Colville Confederated Tribes in eastern Washington and a Judge of the Northwest Intertribal Court System, through which she serves as the Associate Justice of the Colville Court of Appeals and Chief Judge of the Tulalip Tribal Court. President Barack Obama appointed Judge Pouley to the Commission. Formerly, Judge Pouley served as Chief Judge of the Lummi Tribal Court, President of the Northwest Tribal Court Judges Association, and on the Board of Directors for the National American Indian Court Judges Association. She presented to U.S. Supreme Court Justices O’Conner and Breyer on “Indigenous Justice Paradigms.” On numerous occasions, she testified before the U.S. Senate Committee on Indian Affairs. For the last several years, she has worked and lectured with the Administrative Office of the Washington State Courts and local, state, and national conferences regarding domestic violence and Indian law. In 2004, she was selected by the Washington Supreme Court to sit on the “Historical Court of Justice,” which reviewed and exonerated Chief Leschi. She was awarded the National Tribal Child Support’s Award for Outstanding Judge in 2005, and she was part of the Tulalip Tribal Court team that was recognized with a Harvard University Honoring Nations Award in 2006 for its focus on therapeutic and indigenous approaches to criminal law. She earned her B.A. from Gonzaga University and her J.D. from Wayne State College of Law.



TED QUASULA

Mr. Quasula, a member of the Hualapai Tribe, is general manager of the Grand Canyon Frontier, a tourist attraction in northwest Arizona. He was appointed to the Commission by President Barack Obama. Mr. Quasula entered law enforcement with the Flagstaff Police Department in 1972. For 26 years, he served in the Bureau of Indian Affairs Office of Law Enforcement Services, where he rose through the ranks from field criminal investigator to director of the national program. Mr. Quasula was Chief of Police for the Las Vegas Paiute Tribe from 2003 to 2007. He is the immediate past chairman of the Nevada Indian Commission, serving in the Nevada Governor’s cabinet. Mr. Quasula is also the immediate past president of the board of directors of the Northern Arizona University Alumni Association. He currently serves on the NAU Foundation board of directors. Mr. Quasula is a graduate of the FBI National Academy and the Program for Senior Executives at the John F. Kennedy School of Government at Harvard University. He received his B.S. and M.S. from Northern Arizona University.

JEFF J. DAVIS

Immediately before joining the Commission, Jeff J. Davis was an Assistant U.S. Attorney for the Western District of Michigan from 1995 to 2011, where he prosecuted a wide variety of crimes committed in Indian country and served as the liaison between the office and 11 federally recognized tribes. Upon completion of his work with the Commission, Mr. Davis will rejoin the U.S. Attorney's Office. He also taught Federal Indian law as an adjunct professor at Detroit Mercy School of Law. Prior to joining the U.S. Department of Justice, Mr. Davis was an associate attorney with Boulder-based Greene, Meyer & McElroy, P.C., a law firm that represented Indian tribes throughout the United States on issues ranging from gaming and water rights litigation to recognition and protection of Tribal treaty rights. Early in his career Mr. Davis worked on a contract basis for the U.S. Attorney's Office for New Mexico on water adjudication for the Tribes in that district. He grew up in North Dakota on the reservation of the Turtle Mountain Band of Chippewa Indians and is an enrolled member of the Tribe. Mr. Davis received his B.A. from the University of North Dakota and his J.D. from the University of New Mexico.

EILEEN M. GARRY

As Deputy Director of the Bureau of Justice Assistance (BJA), Office of Justice Programs in the U.S. Department of Justice, Ms. Garry oversees planning, legislative affairs, budgeting, performance measurement and evaluation, and print and electronic communications. Ms. Garry joined BJA in September 2001 and immediately assumed leadership for processing death benefits for public safety officers killed on 9/11. She subsequently developed and administered several anti-terrorism programs and was actively engaged in infrastructure recovery and relief efforts following Hurricanes Katrina and Rita. Ms. Garry has worked closely with Tribes in the development and implementation of the Tribal Law and Order Act and in renovation and construction of correctional facilities on tribal lands. She also managed the Radiation Exposure Compensation Act (RECA) Outreach program, which involved recruiting, selecting, and training Native American students in the four corners region to conduct intensive outreach efforts in Tribal communities. RECA provides payments to those who became seriously ill after being exposed to radiation through nuclear weapons tests or in the uranium mining industry in the 1940s, 1950s, and 1960s.

Earlier in her career, Ms. Garry concentrated on child protection and juvenile justice issues affecting State, local, and Tribal programs. She is a member of DOJ's Senior Executive Service, the highest-level appointment for career civil servants, has received numerous awards, and is the author of more than 20 publications on criminal and juvenile justice issues. Ms. Garry earned her bachelor's and master's degree from the American University in Washington, DC.

LAUREL IRON CLOUD

Laurel Iron Cloud, an enrolled member of the Oglala Sioux Tribe, was raised in southwest South Dakota in the Knife Chief community on the Pine Ridge Reservation. She currently serves as the deputy director of the Indian Law and Order Commission. Prior to working with the commission, Ms. Iron Cloud was the criminal law specialist for the Division of Tribal Justice, Office of Justice Services in the Bureau of Indian Affairs, U.S. Department of the Interior. In that position, she provided outreach and assistance to Tribes developing new court systems, and she evaluated existing Tribal courts for Tribes interested in enhancing their criminal justice systems. Immediately upon graduation from law school, Ms. Iron Cloud returned to her home Tribal community to provide civil advocacy to victims of domestic violence and sexual assault. She continued her legal career in private practice, joining the Abourezk Law Firm in South Dakota to represent Tribes, Tribal housing and educational organizations, and individual plaintiffs before State, Federal, and Tribal courts. Ms. Iron Cloud has also served as a civil, juvenile, and family court judge for the Ft. McDowell Yavapai Nation in Arizona. She earned her B.A. from Georgetown University and her J.D. from the University of Colorado School of Law.

INDIAN LAW AND ORDER COMMISSION TRIBAL ADVISORY COMMITTEE

ALASKA

Wilson Justin, a Cheesh'na Tribal member, is a founder, current vice president and health director of the Mount Sanford Tribal Consortium, a service corporation for Chistochina Village and Mentasta Village. He previously served as president of Copper River Native Association (1987–89) and as president and CEO of Ahtna, Inc. (1991–95). Mr. Justin also serves on the Alaska State Community Service Commission and the Alaska Rural Justice and Law Enforcement Commission.

Georgianna Lincoln, originally from Rampart, AK, currently resides in Anchorage and has been on the board of Doyon, Ltd. since 1976. She was chairwoman from March 2005 to March 2008, currently serves on the Corporation's finance and investment committee and on the board of Doyon Government Contracting, Inc. (a Doyon, Ltd. Subsidiary), and is Doyon's representative on the Alaska Federation of Natives board of directors. Ms. Lincoln is also one of nine trustees for First Alaskans Institute. She is the only Alaska Native woman ever elected to the Alaska State Senate, from which she retired in 2005 after 14 years of service. Ms. Lincoln also served on many State boards and commissions. Other past appointments include executive director of Fairbanks Native Association, director of programs for Tanana Chiefs Conference, board member for the Alaska Native Heritage Center, and consultant to the National Indian Women's Association.

EASTERN

Cheriena Brooke Ben is a member of the Mississippi Band of Choctaw Indians and a member of the nation's 17-member democratically elected Tribal council, where she represents the Pearl River Community, the largest of 8 recognized communities that comprise the Tribe. Ms. Ben was elected to her second term and serves the Tribal council as chairwoman of the Judicial Affairs and Law Enforcement Committee. Prior to joining the legislative branch, she served as program coordinator for the Osapausi Amasalichi Reentry Program, a U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention demonstration grant. The Mississippi Band of Choctaw Indians was one of only three Tribes to receive this award, which engaged youth in the creation of sustainable, culturally appropriate energy initiatives aimed at reducing recidivism, providing alternatives to incarceration, and sustaining and strengthening family dynamics through Choctaw traditional beliefs and heritage.

Robert Odawi Porter is an expert in the field of American Indian law and has dedicated his 20-year legal career to protecting and expanding the rights of Indigenous nations and peoples. He joined the Dentons law firm on January 1, 2013, following the completion of his term as the 67th president of the Seneca Nation of Indians. He also served the Seneca Nation for nine years as its chief legal counsel, holding the position of attorney general and later acting as senior policy advisor and counsel. Before serving as Seneca Nation president, President Porter spent more than 10 years as a tenured law professor at the University of Kansas, the University of Iowa, and Syracuse University. He is the author of numerous scholarly publications on Indigenous law and governance, Tribal sovereignty, and the cultural, political and legal impacts of Euro-American colonization on Indigenous peoples. He has lectured widely at universities, professional conferences, and Tribal events; been an active media contributor; and served as a consulting expert and expert witness in matters pending before U.S. and Indian Tribal courts. A member of the Heron Clan of the Seneca Nation, President Porter was raised on the nation's Allegany Territory. He is a graduate of Syracuse University and Harvard Law School.

EASTERN OKLAHOMA

Deanna Hartley-Kelso, a citizen of the Chickasaw Nation, has served as attorney general for the nation's Division of Justice since 2004. Prior posts with the nation include legislative counsel and general counsel. Ms. Hartley-Kelso is licensed by both Oklahoma and Texas Bar Associations; holds memberships in the Oklahoma Indian Bar Association, Native American Bar Association, and Federal Bar Association; is president of the Chickasaw Bar Association; and is a fellow of the College of the State Bar of Texas, an organization that recognizes professionalism through education. In addition to serving on many Chickasaw Nation boards and committees, she is an officer with the Chickasaw Foundation Board of

Trustees, a citizen appointee to the Arkansas Riverbed Authority, and a gubernatorial appointee to the Oklahoma Juvenile Affairs Board, which she chaired in 2012. A graduate of the University of Tulsa College of Law, she has practiced corporate law as an in-house attorney, volunteered with the North Texas Legal Services-American Indian Law Project, represented the Chickasaw Nation at the 2004 United Nations Working Group on the Draft Declaration of the Rights of Indigenous Peoples in Geneva, and served as an adjunct professor for the East Central University Legal Studies program and the University of Tulsa College of Law Master of Jurisprudence in Indian Law program.

William G. Rice, a Keetoowah Cherokee member, is on the faculty of the University of Tulsa College of Law, where he teaches advanced Indian law and constitutional law. He is the founding director of the university's L.L.M program in American Indian and Indigenous Law and co-directs its Native American Law Center. Prior to joining the law faculty, Rice spent almost 18 years in private practice representing Tribes and Tribal entities. He successfully litigated cases in the Federal courts, including *Oklahoma Tax Commission v. Sac and Fox Nation* in the U.S. Supreme Court. Mr. Rice served as attorney general for the Sac and Fox Nation and other Tribes, chief justice for the Citizen Potawatomi Nation, supreme court justice for the Sac and Fox and Kickapoo Nations in Kansas, and assistant chief of the United Keetoowah Band of Cherokee Indians in Oklahoma. He taught in the former Antioch School of Law's Indian paralegal program, was a visiting professor in the University of Oklahoma's Political Science Department and at Cornell Law School, and was founding director of the Northern Plains Tribal Judicial Training Institute at the University of North Dakota School of Law. His casebook, *Tribal Governmental Gaming Law*, is the first law school-level casebook published for use in Indian gaming law classes. Mr. Rice is a graduate of the University of Oklahoma College of Law.

GREAT PLAINS

Rodney Bordeaux is the former president of the Rosebud Sioux Tribe, a position he held for 7 years. Before being elected president, Mr. Bordeaux served as a Tribal council representative for 13 years. Since October 2012, he has served as the chief operating officer of St. Francis Mission, based in St. Francis, South Dakota, within the Rosebud Sioux Reservation. He received his bachelor's degree from Augustana College and a master's degree from Oglala Lakota College.

Linda Thompson is an Ojibwe, enrolled with the Bois Fort Band of Chippewa, and has ties to both the Leech Lake and Mille Lacs Bands of Ojibwe. She is the founding director of the Spirit Lake Tribe Victim Assistance Program and co-founder and executive director of First Nations Women's Alliance, a regional Tribal domestic violence/sexual assault coalition, whose members include representatives from the Turtle Mountain Band of Chippewa Indians; Spirit Lake Tribe; Mandan, Hidatsa,

and Arikara Nation; Standing Rock Sioux Tribe; Trenton Indian Service Area; and the native urban population in Bismarck, North Dakota. The Tribal Coalition, 1 of 23 across the United States, is a 501(c)3 nonprofit organization, with the mission of addressing domestic violence and sexual assault in Indian country.

MIDWEST

Korey Wahwassuck is district judge for the Itasca County District Court in Grand Rapids, Minnesota. Prior to that, she served for 7 years as associate judge and chief judge of the Leech Lake Band of Ojibwe Tribal Court in Cass Lake, Minnesota, and for 3 years as a Tribal attorney for the Leech Lake Band. Before working for Leech Lake, Judge Wahwassuck practiced law for 15 years in Missouri and Kansas, specializing in Indian law, child welfare, and juvenile delinquency. She also served as a core, domestic, and parent/adolescent certified mediator of the Kansas Supreme Court and taught courses on Native American spirituality and sovereignty, treaty rights and Tribal sovereignty, Tribal court-State issues, and juvenile delinquency guidelines at Penn Valley Community College in Kansas City, Missouri and Leech Lake Tribal College. Judge Wahwassuck is a past chair of the National Council of Juvenile and Family Court Judges Tribal Court Committee and a member of its Tribal Leadership Forum. She is on the board of the National Association of Drug Court Professionals, chairs its Tribal Courts Committee, and served on both the Drug Court Initiative Advisory Committee and Racial Fairness Committee of the Minnesota Supreme Court. Judge Wahwassuck helped establish the first Joint Tribal-State Wellness (DWI/Drug) Courts in the nation. Her publications include “The New Face of Justice: Joint Tribal-State Jurisdiction” for the Washburn Law Journal and “Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction” for the William Mitchell Law Review. Judge Wahwassuck is an alumna of the National Judicial College and joined its faculty in 2008. She is a graduate of University of Missouri-Columbia.

David D. Raasch, an enrolled member of the Stockbridge-Munsee Band of Mohican Indians, is a faculty member at the National Judicial College in Reno, NV, vice president of the board of directors for the Tribal Law and Policy Institute in West Hollywood, CA, and an independent consultant. He recently retired as a Tribal project specialist for the National Criminal Justice Training Center at Fox Valley Technical College, which provides training and technical assistance for law enforcement agencies and justice systems, including Native American communities throughout the United States. Prior to joining Fox Valley Technical College, Mr. Raasch was a police officer in Shawano, WI and then the clerk of municipal court for the City of Green Bay, WI until his retirement in 2004. He also served the Mohican Nation Tribal Court as chief judge (1995–2005) and associate judge (2006–13), and he is past president of the Wisconsin Tribal Judges’ Association. He assisted in the production of Tribal Nations: The Story of Federal Indian Law, an hour-long documentary. He is a national speaker on topics of reparative justice, peacemaking, and developing cross-jurisdictional relationships.

NAVAJO

Albert Hale is the former president of the Navajo Nation. Mr. Hale currently serves as a State representative in the Arizona House of Representatives, where he represents Northeastern Arizona. He previously served in the Arizona State Senate. He is a member of the New Mexico bar and the Navajo Nation Bar Association. An enrolled member of the Navajo Nation, he was born in Ganado and raised in Klagetoh, AZ. He is Ashiihi (Salt Clan), born for Todichiini (Bitter Water Clan). His maternal grandparents are Hanaghani (Walk About Clan). His paternal grandparents are Kiyanii (Tall House Clan). He is a 1969 graduate of Fort Wingate High School, a Bureau of Indian Affairs boarding school located east of Gallup, NM. He holds a B.S. from Arizona State University, a J.D. from the University of New Mexico, and an honorary J.D. from Phoenix School of Law.

Harrison Tsosie is the attorney general of the Navajo Nation; he oversees the Office of the Attorney General, Navajo Hopi Legal Services, Office of the Prosecutor, and the Navajo Nation's juvenile justice program. His current legal projects focus on energy development and retention of energy projects on behalf of the Navajo Nation. Prior to his appointment as attorney general, Mr. Tsosie served as Navajo Nation deputy attorney (2004–11) and legal counsel for Navajo Agricultural Products Industry (1997–2011). Mr. Tsosie holds an A.S. in Native American Studies, B.S. in Psychology, and J.D. from the University of Utah.

NORTHWEST

Ron J. Whitener is a senior lecturer at the University of Washington School of Law, where he teaches criminal law, Federal Indian law, and mental health law. He also directs the Tribal Court Defense Clinic. His research focuses on Indigenous nations' regulation of and participation in research conducted in their communities. Mr. Whitener is also an associate justice on the Northwest Indian Court of Appeals and served 6 years as the chief judge for the Chehalis Tribe. Prior to joining the law faculty, he worked as in-house counsel for the Squaxin Island Tribe (of which he is a member) and at the Northwest Justice Project, representing low-income Native Americans in Tribal, State, and Federal courts. In 2009, Mr. Whitener was named the "Emerging Legal Clinician of the Year" by the American Association of Law Schools, and in 2010 he was named a "White House Champion of Change" by President Barack Obama. He remains active with his Tribe, serving in advisory capacities to the Tribal council, participating in various cultural activities, and treaty fishing.

Brian Cladoosby is one of the most senior Tribal political leaders in Washington State and the Pacific Northwest, having served the Swinomish Indian Senate, the governing body of the Swinomish Indian Tribal Community, as chairman since 1997 and as a member since 1985. He

is the president of the Association of Washington Tribes, a member of the Washington Gaming Association Executive Board, a member of the National Congress of American Indians Vice Presidents' Board, past president of the Affiliated Tribes of Northwest Indians, and is continually active in Tribal and State politics. He is also co-speaker of the international Coast Salish Gathering, an intergovernmental association of British Columbia First Nations and Western Washington Tribes. Chairman Cladoosby has been instrumental in the domestic and international emergence of the northwest Indian country salmon and seafood industry. He shares a vision with the Swinomish Indian Tribal Community of a strong economic development plan that can support its citizens' way of life.

PACIFIC

Abby Abinanti, a Yurok Tribal member, is the chief judge of the Yurok Tribe. A graduate of Humboldt State College and the University of New Mexico School of Law, Judge Abinanti has been a member of the California State Bar since 1974. She is also a retired San Francisco superior court commissioner, having served 17 years in the family law division with assignments in family law, dependency, and delinquency. Judge Abinanti is currently president of the Tribal Law and Policy Institute Board of Directors, president of the Friendship House Association of American Indians, Inc. of San Francisco, and a member of the California Tribal Court/State Court Forum commissioned by Supreme Court Chief Justice Ron George.

Bill Denke is chief of police for the Sycuan Band of the Kumeyaay Nation, a position he has held for the past 8 years. His duties include overseeing the day-to-day operations of the police department, maintaining the department's budget, personnel training and development, and grant management. Mr. Denke also has worked closely with Sycuan's tribal community to develop and implement the Tribe's first peace and safety code, vehicle code, and pre-hazard mitigation emergency response plan. He currently serves as chairman of the California Tribal Police Chiefs' Association. In 2009, the California Commission on Peace Officer Standards and Training requested that he serve as a subject matter expert in developing two new training curriculums, "Policing Indian Lands" and "Responding to Domestic Violence and Sexual Assault Calls on Tribal Lands," for peace officers throughout the State. Mr. Denke received his formal law enforcement training at the San Diego Regional Law Enforcement Training Center and advanced training through the Federal Law Enforcement Training Center. He also holds a B.S. in Liberal Studies.

ROCKY MOUNTAIN

Heather Whiteman Runs Him is a staff attorney at the Native American Rights Fund in Boulder, CO, where she focuses on Tribal water rights and natural resource issues. She previously served as joint lead counsel

for the Crow Tribe of Montana, where she was responsible for a wide variety of legal issues pertaining to intergovernmental relations, Tribal land management, water rights, elections, health and social services, law enforcement, economic development, and general litigation. Prior to working with the Crow Tribe, Ms. Whiteman Runs Him practiced in New Mexico as an assistant public defender and worked as an associate attorney in private practice, serving Tribal governmental clients on a wide variety of issues. She is a member of the Crow Tribe and grew up on the Crow Reservation. She received her A.F.A. from the Institute of American Indian Arts, B.A.F.A. from the University of New Mexico, J.D. from Harvard Law School, and is licensed to practice law before the State Bar of New Mexico, the Federal courts of the District of New Mexico, and the Crow Tribal Court.

Ivan D. Posey is Shoshone, Northern Arapaho, and Northern Cheyenne; a member of the Eastern Shoshone Tribe; and a member of the Shoshone Business Council. He was first elected in 1994 and has twice served the Council as its chairman (2000–02 and 2004–10). As a council member, the focus of Mr. Posey’s work has been in the areas of public safety, law enforcement, youth issues, and gaming. He is currently chairman of the Montana-Wyoming Tribal Leaders Council and serves on the boards of the Central Wyoming College Foundation, Americans for Indian Opportunity, Advancement for Indigenous Opportunity International, Fremont County Group Homes, and Boys and Girls Club of the Eastern Shoshone Tribe. At the State level, he serves on the Governor’s Substance Abuse Advisory Council and Impaired Driving Committee and in 2003-2004, served as the first State of Wyoming Tribal liaison for the Shoshone and Arapaho Tribes of the Wind River Indian Reservation. Mr. Posey was born and raised on the Wind River Indian Reservation, is a U.S. Army veteran, and had a civilian career in timber and fire management before beginning his service as an elected official. Mr. Posey attended Fort Washakie School, Chilocco Indian School, and Central Wyoming College.

SOUTHERN PLAINS

George Thurman is principal chief of the Sac and Fox Nation and is currently serving in his second term. Earlier, he served the nation as Tribal secretary (2000–07). He is also chairman of the United Indian Nations of Oklahoma, Kansas, and Texas; vice-chairman and secretary of the Self-Governance Communication and Education Tribal Consortium Board; National Congress of American Indians Southern Plains Area vice-president; secretary of Inter-Tribal Monitoring Association Board; the Southern Plains alternate to the U.S. Department of the Interior and Indian Health Service Self-Governance Advisory Committee; a member of the Shawnee, OK Head Start board; and a member of the National Indian Education Association. He was nominated as Southern Plains Region representative to the U.S. Attorney General’s Tribal Nations Leadership Council. Chief Thurman received his B.S. in organizational leadership from Southern Nazarene University.

Robert Tippeconnie most recently served as the secretary-treasurer of the Comanche Business Committee, the elected body serving the Comanche Nation of Oklahoma. Mr. Tippeconnie also has represented the Southern Plains as a National Congress of American Indians regional vice president and as a member of the Bureau of Indian Affairs Tribal Consultation Board.

SOUTHWEST

Janelle F. Doughty is the director of the Ute Mountain Ute Tribe Department of Social Services and a professional consultant on criminal justice issues in Indian country. Prior to her appointment at Ute Mountain, Ms. Doughty held several senior leadership positions with the Southern Ute Indian Tribe, including director of the Department of Justice and Regulatory Affairs, executive officer, and crime victims' advocate. In recognition of her professional achievements, in 2008 Ms. Doughty received the Outstanding Public Safety Director of the Year Award from the National Native American Law Enforcement Association. She has also testified before the U.S. Senate Committee on Indian Affairs as an expert on criminal justice in Indian country. In April 2009, Colorado Governor Bill Ritter appointed Ms. Doughty to a 3-year term on the Colorado Commission on Civil Rights. An enrolled member of the Southern Ute Indian Tribe, Ms. Doughty grew up on the Navajo Nation in Shiprock, NM. Her parents are Southern Ute and Navajo (Dine'). Ms. Doughty graduated from New Mexico Highlands University and earned her master's degree in social work from the University of Denver. She is also a graduate of the State of New Mexico Police Academy.

Robert Medina, a member of the Pueblo of Zia, is an assistant district attorney for the Eleventh Judicial District of New Mexico and sits on the newly created Pueblo de San Ildefonso Supreme Court as an associate justice. Prior to these appointments, Justice Medina served as an associate judge for the Pueblo of Isleta, a justice on the Southwest Intertribal Court of Appeals, chief judge of the contemporary court for the Pueblo of Zia, and pro-tem judge for the Pueblos of Tesuque, Laguna, and Isleta. He has served as the Tribal co-chair of the New Mexico Tribal-State Judicial Consortium and on the Sandoval County DWI Task Force, New Mexico Behavior Health Local Collaborative 16, and the T'siya Elementary and Middle School Board. He has twice been appointed to serve as a Pueblo of Zia Tribal official and has been an active Tribal councilman. Prior to entering the University of New Mexico School of Law, Justice Medina worked in campus security and conducted corporate security investigations.

WESTERN

Billy A. Bell is a member of the Paiute and Shoshone Tribe of the Fort McDermitt Indian Reservation, NV. Raised on the reservation, his sincere devotion to his homeland and upbringing is credited to his grandmothers.

He served the Tribal Council for 6 years before becoming chairman in 2009. As a councilmember, he sat on the Fort McDermitt Land Use and Law and Order Committees. As chairman, his priorities included land acquisition, public safety, health, range management, Tribal water rights, economic development, cultural affairs, and consultation in the protection of traditional and cultural property affected by the mining industry. He is particularly committed to involving Tribal youth, with the aid of elders and advisors, in Tribal governmental and cultural affairs. Chairman Bell has served as president of the Inter-Tribal Council of Nevada, Inc., chairman of the Upper Snake River Tribes Foundation, and commissioner of the Columbia Basin Fish and Wildlife Authority. He is also a member of the BIA Western Region Tribal-Interior Budget Committee, the Phoenix Area Indian Health Service Steering Committee, and the U.S. Department of the Interior Tribal Consultation Policy Team. Chairman Bell has testified before the U.S. Senate Committee on Indian Affairs, lobbied Congress, and presented before the U.S. Departments of State and Defense ensuring Tribal input on the Columbia River International Treaty concerning the protection of fishing rights and culture. He received his AAS in criminal justice from the United Tribes Technical College in Bismarck, ND.

Edward Reina is a member of the Salt River Pima-Maricopa Indian Community (Akimel O'odham) and a retired police executive. Mr. Reina worked for five Tribal governments, serving four as chief of police (the Salt River Pima-Maricopa Indian Community, Fort McDowell Yavapai Nation, Reno-Sparks Indian Colony, and Yavapai Prescott Indian Tribe) and another as director of public safety (Tohono O'odham Nation). Mr. Reina served on GLOBAL, a Federal advisory committee dealing with criminal justice information sharing. He is a board member of the Tribal Law and Policy Institute, and he was the first Tribal police chief to serve as president of the Arizona Association of Chiefs of Police and on the Executive Committee of the International Association of Chiefs of Police. Edward Reina chaired and co-authored "Crime in Indian Country Report April 1994," presented to U.S. Attorney General Janet Reno. He chaired the planning and development of the 2001 IACP summit, "Improving Safety in Indian Country," a report that is still used by the U.S. Department of Justice.

INDIAN LAW AND ORDER COMMISSION WITNESS LIST

PUBLIC HEARING AT TULALIP INDIAN RESERVATION, WA SEPTEMBER 7, 2011

Abinanti, Abby, chief judge, Yurok Tribe

Anderson, Robert, professor and director, Native American Law Center,
University of Washington School of Law

Botelho, Bruce, commissioner, Alaska Rural Justice and Law Enforcement
Commission; mayor, Juneau, Alaska; and former Attorney General
of Alaska

Bridge, Bobbe, president and chief executive officer, Center for Children
and Youth Justice and former associate justice, Washington Supreme
Court

Cohan, Molly, lecturer and supervising attorney, Tribal Court Public
Defense Clinic, University of Washington School of Law

Corcoran, Carma, Indian law program coordinator, Lewis & Clark Law
School

Ellis, Janie, prosecutor, Tulalip Tribes

Folkman, Chorisa, managing attorney, Tulalip Office of Civil Legal Aid

Halverson, Lowell, vice president, Executive Council of the Native Village
of Kluti-Kaah

Haney, Matt, chief of police, Confederated Tribes of the Colville Reservation

Johnson, William, chief judge, Confederated Tribes of the Umatilla Indian Reservation

Kent, Patrece, attorney

Leonhard, Brent, deputy attorney general, Confederated Tribes of the Umatilla Indian Reservation

McCoy, John, 38th Legislative District representative, Washington State House of Representatives

Montoya-Lewis, Raquel, judge, Lummi Nation Tribal Court

Owens, Susan, justice, Washington Supreme Court

Pouley, Mark, chief judge and court administrator, Swinomish Indian Tribal Community Tribal Court and judge, Sauk-Seattle Indian Tribe Tribal Court

Simmons, Davis, director of government affairs and advocacy, National Indian Child Welfare Association

Thorne, Jr., William, judge, Utah State Court of Appeals

Tso, Ron, chief of police, Lummi Nation

Whitener, Ron, senior lecturer and executive director, Native American Law Center and director, Tribal Court Public Defense Clinic, University of Washington School of Law

Yogi, Jennifer, staff attorney, Northwest Justice Project Native American Unit

PUBLIC HEARING IN PORTLAND, OR NOVEMBER 2, 2011

Addleman, Tim, chief of police, Confederated Tribes of the Umatilla Indian Reservation

Arnett, Howard, general counsel, Confederated Tribes of the Warm Springs Reservation

Gabliks, Eriks, director, Oregon Department of Public Safety Standards and Training

Garcia, Joe, councilman, Ohkay Owingeh

Harju, Philip, tribal attorney, Cowlitz Indian Tribe

Jones, Olin, director, Office of Native American Affairs, California Attorney General's Office

Lorance, Marlin, deputy director, Oregon Department of Public Safety Standards and Training

Martin, Justin, lobbyist, Confederated Tribes of Grand Ronde

Nelson, GeorGene, tribal council member, Klamath General Council

Shepherd, Peter, general counsel, Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians

Striffler, Stephanie, Native American affairs coordinator and senior assistant attorney general, Oregon Department of Justice

Suppah, Ron, vice chairman, Confederated Tribes of the Warm Springs Reservation

Tsumpti, Raymond, council member, Confederated Tribes of the Warm Springs

PUBLIC HEARING AT SANTA ANA PUEBLO, NM DECEMBER 14, 2011

Cheriena, Ben, re-entry coordinator, Osapausi Amasalichi Re-entry Program, Mississippi Band of Choctaw Indians

Deloria, Sam, director, American Indian Graduate Center

Hunter, Candida, manager, Hualapai Green Re-entry Program, Hualapai Juvenile Detention and Rehabilitation Center

Menard, David, director, Sault Ste. Marie Juvenile Detention Center

Miner, Lorrie, judge, Lower Brule Sioux Tribe

Peters, Jeremy, deputy director, Sault Ste. Marie Juvenile Detention Center

Rappold, Matthew, chief prosecutor and Special Assistant United States Attorney, Rosebud Sioux Tribe

Romero, John, district court judge, Children's Court Division, 2nd Judicial District, Albuquerque, NM

Stevens, Bernard, representative, Copper Lake/Lincoln Hills Juvenile Detention Facility and vice president, Wisconsin Inter-Tribal Alliance for Justice

Yamamoto, Lily, independent consultant

PUBLIC HEARING AT SALT RIVER INDIAN RESERVATION, AZ JANUARY 1, 2012

Armstrong, Richard, chief of police, Colorado River Indian Tribes

Bell, Billy, chairman, Fort McDermott Tribe and chairman, Intertribal Council of Nevada

Delmar, Jesse, chief of police, Fort McDowell Yavapai Nation

Flies Away, Joseph, pro-tem judge, Fort Mojave Tribe and Judicial Consultant

Freemont, Sherri, chief tribal prosecutor, Salt River Pima-Maricopa Indian Community

Hale, Albert, Arizona State representative, consultant, and former president, Navajo Nation

Little, Anthony, chief judge, Ak-Chin Indian Community

Lomayesva, Amanda Sampson, deputy attorney general, Pasqua Yaqui Tribe

Lomayesva, Fred, chief judge, Hopi Appellate Court

Miller, Allison, community member, Salt River Pima-Maricopa Indian Community
Orose, Michael, director, Arizona Counter Terrorism Information Center
Reina, Edward, (ret.) director of public safety, Tohono O’odham Nation
Rupert, Sherry L., executive director, State of Nevada Indian Commission
Scarber, Larry, major, Arizona Highway Patrol, Arizona Department of Public Safety
Urbana, Fred, chief prosecutor, Pasqua Yaqui Tribe
Wahwassuck, Korey, associate judge, Leech Lake Band of Ojibwe
Yamamoto, Lily, independent consultant
Yellowbird, Ronald, associate judge, Northern Ute Tribe

PUBLIC HEARING AT AGUA CALIENTE INDIAN RESERVATION, CA FEBRUARY 16, 2012

Alther, Dorothy, senior staff attorney, California Indian Legal Services
Brandenburg, Anthony, chief judge, Intertribal Court of Southern California
Denke, William, chief of police, Sycuan Band of Kumeyaay Nation
Fletcher, Troy, executive director, Yurok Tribe
Gallegos, Paul, district attorney, Humboldt County, CA
Joseph, Rachel, chairperson, California Indian Legal Services
Mazzetti, Bo, chairman, Rincon Band of Luiseno Indians
McQuillen, Mary, chief of police, Yurok Tribe
Myers, Joseph, executive director, National Indian Justice Center
Peck, La Vonne, chairwoman, La Jolla Band of Luiseno Indians
Powell, Leonard, council representative, Hopland Band of Pomo Indians
Reitman-Solas, Connie, executive director, Inter-Tribal Council of California, Inc.
Wood, Lyndon Ray, lieutenant, Riverside County Sheriff’s Department

PUBLIC HEARING IN ARLINGTON, VA MARCH 7, 2012

Broken Leg-Brill, Patricia, acting associate director of corrections, Office of Justice Services, Bureau of Indian Affairs, U.S. Department of the Interior
Cruzan, Darren, director, Office of Justice Services, Bureau of Indian Affairs, U.S. Department of the Interior
Geiger, Maurice, director, Rural Justice Center
Harding, Frances, director, Center for Substance Abuse Prevention, Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services

Johnson, Brendan, United States Attorney, District of South Dakota and chair, Native American Issues Subcommittee, Attorney General's Advisory Committee, U.S. Department of Justice

Leary, Mary Lou, principal deputy assistant attorney general, Office of Justice Programs, U.S. Department of Justice

Scott, Carol Wild, deputy director, Veterans Consortium Pro Bono Program

Toulou, Tracy, director, Office of Tribal Justice, U.S. Department of Justice

Weahkee, Rose, director, Division of Behavior Health, Indian Health Service, U.S. Department of Health and Human Services

PUBLIC HEARING AT POJOAQUE PUEBLO, NM APRIL 19, 2012

Bowman, Kathleen, director and attorney, Office of the Public Defender, Navajo Nation

Creel, Barbara, professor, University of New Mexico School of Law

Crofts, Christopher "Kip," United States Attorney, District of Wyoming

McCue, Steven, Federal public defender, District of New Mexico

Molzen, Karen, chief magistrate judge, U.S. District Court, New Mexico

Snow, Murray, judge, U.S. District Court, Arizona

Vazquez, Martha, judge, U.S. District Court, New Mexico

Walsh, John, United States Attorney, District of Colorado

Washburn, Kevin, dean, University of New Mexico School of Law

West, David, magistrate judge, U.S. District Court, Colorado

PUBLIC HEARING AT ROSEBUD INDIAN RESERVATION, SD MAY 16, 2012

Ayers, Jamie, truancy prosecutor, Rosebud Sioux Tribe

Bordeaux, Rodney, president, Rosebud Sioux Tribe

Cerney, James, public defender, Standing Rock Sioux Tribe

De Hueck, Adam, prosecutor, Lower Brule Sioux Tribe

Doughty, Janelle, director, Department of Social Services, Ute Mountain Ute Tribe

Glover, John, professor, Black Hills State University

Johnson, Brendan, United States Attorney, District of South Dakota and chair, Native American Issues Subcommittee, Attorney General's Advisory Committee, U.S. Department of Justice

LaPlante, Leroy "J.R.", secretary of tribal relations, South Dakota

Petite, Miskoo, facility administrator, Wanbli Wiconi Tipi (Juvenile Detention Center)

Posey, Ivan, councilman, Eastern Band of Shoshone Wind River Reservation
Rappold, Matthew, chief prosecutor and special assistant United States
Attorney, Rosebud Sioux Tribe
Spotted Eagle, Faith, community advocate, Brave Heart Society of the
Ihanktonwan
Standing High, Mato, attorney general, Rosebud Sioux Tribe
Stites, Natalie, Rosebud Sioux Tribe Defending Childhood Initiative
Sully, Janelle, judge, Rosebud Sioux Tribe Juvenile Court
Witt, Nicole, executive director, White Buffalo Calf Woman Society

PUBLIC HEARING IN OKLAHOMA CITY, OK JUNE 14, 2012

Aragon, Rita, general, U.S. Air National Guard and Oklahoma Secretary of
Veterans Affairs
Bigler, Greg, attorney general, Sac and Fox Nation
Craig, Scott, commander, Cherokee Nation Marshal Service
Deer, Montie, vice chief judge, Muscogee (Creek) Nation
Griffin, Vernon, chief of police, Comanche Nation of Oklahoma
Hartley-Kelso, Deanna, attorney general, Chickasaw Nation of Oklahoma
Johnson, David, special agent in charge, Bureau of Indian Affairs, U.S.
Department of the Interior, Anadarko, OK
LaPorte, Joseph, senior tribal advisor, Office of the Program Manager,
Information Sharing Environment, Office of the Director of National
Intelligence
McGee, Ronald, chief magistrate, Court of Indian Offenses, Western Plains
Division
O'Neal, Jason, chief of police, Chickasaw Nation of Oklahoma
Proctor, Perry, assistant professor, Bacone College
Reheard, Deborah Ann, executive director, Pros 4 Vets
Rice, G. William, associate professor and co-director, Native American Law
Center, University of Tulsa College of Law
Thundercloud, Vivian, chief clerk and court administrator, Winnebago
Tribe

PUBLIC HEARING IN NASHVILLE, TN JULY 13, 2012

Bryant, Robert, chief of police, Penobscot Nation
Garrow, Carrie, executive director, Center for Indigenous Law,

Governance, and Citizenship, College of Law, Syracuse University
Gibson, James, special agent in charge, Bureau of Indian Affairs, U.S.
Department of the Interior, Nashville, TN
Lubow, Bart, director, Juvenile Justice Strategy Group, The Annie E. Casey
Foundation
Monette, Richard, associate professor of Law, University of Wisconsin Law
School

ADDITIONAL TESTIMONY

Clinton, Robert, professor, Arizona State University College of Law
Lujan, Phil, magistrate, Bureau of Indian Affairs, U.S. Department of the
Interior, Southern Plains Region Court of Indian Offenses
Pommersheim, Frank, professor, University of South Dakota School of Law

INDIAN LAW AND ORDER COMMISSION HEARINGS, MEETINGS, PRESENTATIONS, AND VISITS

2011

April 7-9	Pojoaque Pueblo, NM	Indian Law and Order Commission business meeting
May 16-17	Billings, MT	U.S. Department of Justice (DOJ) Tribal Consultation
July 7	Washington, DC	Indian Law and Order Commission business meeting
July 26	Rapid City, SD	Indian Law and Order Commission business meeting
September 6	Tulalip, WA	Meeting with the Tulalip Tribal Council, Elders Panel, Police Department, and Diversion Program
September 6	Tulalip, WA	Meeting with representatives of the Salt River Pima Maricopa Indian Community
September 6	Tulalip, WA	Indian Law and Order Commission business meeting
September 7	Tulalip, WA	Indian Law and Order Commission field hearing
September 14	Ignacio, CO	U.S. DOJ Four Corners Indian Country Conference

September 21-22	Washington, DC	Testimony before the U.S. Senate Committee on Indian Affairs
September 28	Phoenix, AZ	DOJ Tribal Consultation
October 28-29	Lansing, MI	Beyond the TLOA, Michigan State University Indigenous law conference
November 2	Portland, OR	Indian Law and Order Commission field hearing
November 3	Portland, OR	Indian Law and Order Commission business meeting
November 7-8	Albuquerque, NM	Meeting with Native American Issues Subcommittee, U.S. Attorney General's Advisory Committee
November 15	Denver, CO	Meeting with personnel from the Annie E. Casey Foundation, Association on American Indian Affairs, and the National Indian Child Welfare Association
December 13	Santa Ana Pueblo, NM	Indian Law and Order Commission business meeting
December 13	Santa Ana Pueblo, NM	Meeting with the Santa Ana Pueblo Leadership Council
December 14	Santa Ana Pueblo, NM	Indian Law and Order Commission field hearing

2012

January 12	Salt River Pima Maricopa Indian Community, AZ	Indian Law and Order Commission business meeting
January 13	Salt River Pima Maricopa Indian Community, AZ	Indian Law and Order Commission field hearing
February 6	Phoenix, AZ	Visit to the Arizona Fusion Center
February 11	Yurok, CA	Annual meeting of the United States Attorney, Northern District of California, with Northern California Tribes
February 12	Yurok, CA	Meeting with the Yurok Tribal Council
February 15	Palm Springs, CA	Indian Law and Order Commission business meeting
February 16	Palm Springs, CA	Indian Law and Order Commission field hearing
March 6	Arlington, VA	Meeting with the Assistant Secretary of Indian Affairs, U.S. Department of the Interior

March 6	Arlington, VA	Meeting with personnel from the Bureau of Indian Education and Bureau of Indian Affairs (BIA), U.S. Department of the Interior
March 6	Arlington, VA	Meeting with the U.S. Attorney, District of South Dakota
March 6	Arlington, VA	Meeting with personnel from the Office of Tribal Justice, U.S. Department of Justice
March 6	Arlington, VA	Meeting with personnel from the Office of Justice Services, Bureau of Indian Affairs, U.S. Department of the Interior
March 6	Arlington, VA	Meeting with personnel from the Office of Indian Services, Bureau of Indian Affairs, U.S. Department of the Interior Bureau
March 6	Arlington, VA	Meeting with personnel from the Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services
March 7	Arlington, VA	Indian Law and Order Commission business meeting
March 8	Arlington, VA	Indian Law and Order Commission field hearing
April 2	Bernalillo County, NM	Meeting with the personnel from the Annie E. Casey Foundation, Association on American Indian Affairs, and National Indian Child Welfare Association
April 3	Albuquerque, NM	Meeting with the personnel from the Annie E. Casey Foundation, Association on American Indian Affairs, and National Indian Child Welfare Association
April 19	Pojoaque Pueblo, NM	Indian Law and Order Commission field hearing
April 24	Baraboo, WI	Crimes Against Children in Indian Country Conference
May 3	Artesia, NM	Annual Indian Country Law Enforcement Officers' Memorial Service, Indian Police Academy
May 16	Rosebud, SD	Indian Law and Order Commission field hearing
May 17	Rosebud, SD	Indian Law and Order Commission business meeting
May 23	Ft. Washakie, WY	Meeting with the Eastern Shoshone and Northern Arapaho Tribes' Joint Business Council; U.S. Attorney, District of Wyoming; Shoshone and Arapaho Tribal Court; and BIA law enforcement and detention personnel

May 24	Ethete, WY	Meeting with the Eastern Shoshone Business Council, Northern Arapaho Business Council, and respective tribal program directors
June 2	Pine Ridge, SD	Visit to the SuAnne Big Crow Boys and Girls Club
June 7	Isleta Pueblo, NM	Navajo Nation Bar Association, Inc. Annual Conference
June 12	Oklahoma City, OK	Sovereignty Symposium, hosted by the Supreme Court of Oklahoma
June 12	Stroud, OK	Visit to the Sac and Fox Nation juvenile facility
June 13	Oklahoma City, OK	Indian Law and Order Commission business meeting
June 14	Oklahoma City, OK	Indian Law and Order Commission field hearing
June 19	Ethete, WY	Meeting with Wyoming Joint Judiciary Committee
June 28	Washington, DC	Meeting with personnel of the Tribal Civil and Criminal Legal Assistance Program, Bureau of Justice Assistance, Office of Justice Programs, DOJ
July 12	Nashville, TN	Indian Law and Order Commission business meeting
July 12	Nashville, TN	Meeting with United South & Eastern Tribes, Inc.
July 13	Nashville, TN	Indian Law and Order Commission field hearing
August 8	Lander, WY	Wind River Native American conference
August 20	Ketchikan, AK	Visit to Ketchikan Indian Community
August 20	Saxman, AK	Visit to Saxman Village
August 21	Metlakatla, AK	Visit to Metlakatla Indian Community
August 21	Metlakatla, AK	Meeting with Metlakatla Tribal Council, Metlakatla Tribal Court, Mayor Victor Wellington, law enforcement officers serving Metlakatla, and community members
August 22	Kake, AK	Meeting with the Organized Village of Kake Tribal Council
August 23	Juneau, AK	Meeting with the Central Council of Tlingit and Haida Indian Tribes of Alaska
August 23	Juneau, AK	Meeting with Sealaska Corporation

August 23	Juneau, AK	Meeting with Alaska Network on Domestic Violence and Sexual Assault
August 24	Sitka, AK	Visit to the Alaska State Police Academy
August 24	Sitka, AK	Visit to Sitka, AK and meeting with representatives of the Sitka Tribe of Alaska
September 6-7	Seattle, WA	Indian Law Symposium, University of Washington Native American Law Center
September 10-11	Denver, CO	Indian Law and Order Commission business meeting
September 18	Northwest Arctic Borough, AK	Meeting with the Northwest Arctic Borough and Kotzebue Village and Tribal governments
September 19	Buckland, AK	Meeting with the Buckland (Village) Tribal Council
September 20	Barrow, AK	Meeting with Native Village of Barrow Tribal officials, Alaska State Troopers (Barrow Post) officials, and Superior Court Presiding Judge (Barrow)
September 21	Anaktuvak Pass, AK	Meeting with the Native Village of Anaktuvak Pass tribal government
September 24	Bethel, AK	Meeting with the Association of Village Council Presidents
September 24	Napaskiak, AK	Meeting with the Napaskiak Tribal Council and Elders
September 25	Hooper Bay, AK	Meeting with the Hooper Bay Community and Natural Helpers Youth Council
September 26	Emmonak, AK	Meeting with the Emmonak Tribal Council
September 27	Saint Mary's, AK	Meeting with the Saint Mary's Village Council and Andrafski Village Council
September 27	Saint Mary's, AK	Meeting with the Saint Mary's Village Council
October 9-10	Los Angeles, CA	Indian Law and Order Commission business meeting
October 12	Pechanga, CA	Annual Indian Law Conference, California Indian Law Association
October 17-19	Prior Lake, MN	National Tribal Judicial Conference, National American Indian Court Judges Association
October 21	Sacramento, CA	Meeting with National Congress of American Indians Task Force on Violence Against Native Women
October 29	Tanana Village, AK	Meeting with Tanana Village community and leadership

October 29	Galena Village, AK	Visit to Galena Village
October 30	Fort Yukon, AK	Meeting with representatives of Fort Yukon and surrounding Alaska Native villages
October 30	Fairbanks, AK	Visit to the Center for Non-Violent Living
October 31	Glennallen Community, AK	Meeting with Glennallen Community Village public safety officers and tribal representatives
October 31	Tyonek Village, AK	Meeting with representatives of Tyonek Village
October 31	Anchorage, AK	Meeting with personnel from the Alaska Native Tribal Health Consortium
October 31	Anchorage, AK	Meeting with the Alaska Federation of Natives
November 1	Anchorage, AK	Meeting with Members of the Alaska congressional delegation
November 1	Anchorage, AK	Meeting with the Alaska Supreme Court
November 1	Anchorage, AK	Meeting with the Alaska Attorney General
November 8-9	Cambridge, MA	Tribal Courts and the Federal System, Harvard Law School conference
November 15	Window Rock, AZ	Meeting with the Navajo Nation Council
December 8	Agua Caliente, CA	US DOJ National Indian Nations Conference: Justice for Victims of Crime

2013

January 29-30	Phoenix, AZ	Indian Law and Order Commission business meeting
February 25	Las Vegas, NV	Meeting with the Indian Country Law Enforcement Section, International Association of Chiefs of Police
April 4-5	Boulder, CO	Meeting with Ute Mountain Ute Tribal Council
April 12	Santa Fe, NM	Indian Law and Order Commission business meeting
April 12	Santa Fe, NM	Federal Bar Association Indian Law Conference
April 26	Cheyenne, WY	Meeting with the Cheyenne, WY community hosted by St. Mark's Church
June 7	Flagstaff, AZ	Navajo Nation Bar Association, Inc. Annual Conference
June 11	Kykotsmovi, AZ	Meeting with the Hopi Tribe and the Office of Justice Services, Bureau of Indian Affairs, U.S. Department of the Interior

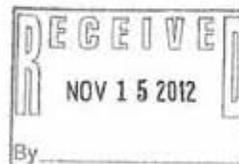
June 23-24	Reno, NV	National Congress of American Indians Mid-Year Conference
July 17-18	Twin Arrows, AZ	Annual intertribal consultation of the United States Attorney, District of Arizona, with Arizona tribes
July 22	Denver, CO	Meeting with the Legal Services Corporation Board of Directors
August 6	Lac du Flambeau, WI	Meeting with the Lac du Flambeau Tribal Council
September 20	Green Bay, WI	Meeting with the Indian Law Section of the Wisconsin Bar Association
October 9	Cabazon, CA	National Tribal Judicial Conference, National American Indian Court Judges Association

APPENDIX G

LETTERS FROM ALASKA

DONALD C. MITCHELL
Attorney at Law
1335 F Street
Anchorage, Alaska 99501
(907) 276-1681 dcraigm@aol.com

November 13, 2012



Carole Goldberg
UCLA School of Law
1242 Law Building
385 Charles E. Young Drive
Los Angeles, California 90095

Dear Carole Goldberg:

Last night Alaska News Nightly, which the Alaska Public Radio Network (APRN) distributes to every public radio station in Alaska, broadcast a story entitled "Commission Says Alaskans Would Benefit From More Cooperation Between States, Tribes." The content thereof was so astounding that this morning I listened to the story again on APRN's website.

The story, which reported on a visit you and Troy Eid recently made to Alaska as members of the Indian Law and Order Commission, contains a snippet from an interview with you in which you lecture the listening audience (which includes thousands of Alaska Native residents of communities that in 1971 Congress designated as "Native villages" for the purposes of the Alaska Native Claims Settlement Act (ANCSA)) that: "There are lands, including Native allotments and townsites, that are federal lands in Alaska which count as Indian country under federal law. And as a result of that the tribes do have legal authority over those lands, whether they own them or not."

As you know, in 1948 the 80th Congress enacted a definition of the term "Indian country", codified at 18 U.S.C. 1151, that designates three categories of land as "Indian country". Those categories do not include parcels of land in Native villages that have been conveyed into private ownership with restricted titles pursuant to the Alaska Native Townsite Act. For that reason, I have no idea why you would assert that those parcels are "Indian country".

Of equal importance, 18 U.S.C. 1151 defines the three categories of land that are "Indian country" as 1) land within the limits of any Indian reservation", 2) "dependent Indian communities", and 3) "all Indian allotments, the Indian titles to which have not been extinguished . . ." (emphasis added).

Carole Goldberg
November 13, 2012
Page 2

Assuming arguendo that there presently are more than two hundred "federally recognized tribes" in Alaska because in 1993 then Assistant Secretary of the Interior for Indian Affairs Ada Deer decided that there should be, and assuming further arguendo that in 1948 the 80th Congress intended the term "Indian allotments" in 18 U.S.C. 1151 to include within its purview allotments that the Secretary of the Interior has issued to Alaska Natives pursuant to the Alaska Native Allotment Act (which the 80th Congress did not), 18 U.S.C. 1151 states that "Indian allotments" are "Indian country" only if the "Indian titles" to the land that has been allotted have not been extinguished.

But in 1971 Congress did exactly that in section 4(b) of ANCSA, which extinguished "all aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy" For that reason, I am astounded that a law professor of reputation would suggest as authoritatively as you did in the radio broadcast whose content has engendered this letter that post-ANCSA there is "Indian country" anywhere in Alaska (including, although the subject is too historically and legally convoluted to detail here, on Annette Island).

Whether Congress has intended for there to be "federally recognized tribes" and "Indian country" in Alaska is a question that remains a controversy which has significant policy consequences for the future of Alaska as a cohesive polity of which the Alaska Native community was a part until the early 1980s when the Native sovereignty movement was invented because of comments such as those you made in the story APRN broadcast last evening. For that reason, as the work of the Indian Law and Order Commission proceeds I certainly hope you will attempt to be more attentive to what the law is - rather than what you might like it to be - than you were during your and Commissioner Eid's trip to Alaska.

Sincerely,



Don Mitchell

cc: Michael Geraghty - Alaska Attorney General
Troy Eid - Indian Law and Order Commission



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNELL

Department of Law

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November 14, 2012

By Email to eidt@gtlaw.com

Troy A. Eid
Greenberg Traurig, LLP
Tabor Center
1200 17th Street, Suite 2400
Denver, CO 80202

Re: *Indian Law & Order Commission*

Dear Chairman Eid:

I want to thank you and Professor Goldberg again for meeting with Commissioner Masters and me on November 1st to discuss the ongoing work of the Indian Law & Order Commission and your research here in Alaska.

On November 5, a local reporter with KNBA contacted my office for a response to comments you had made during an earlier interview. During that interview, you stated that there is less respect and less cooperation between governments in Alaska than in other states, that the State does not have any grounds for disputing tribal jurisdiction within Alaska, and that it is "absurd" for the State to not respect or honor tribal jurisdiction.

I must say I am disappointed that you have, for all intents and purposes, pre-judged some of the issues that you raised at our meeting. At the time, there appeared to be genuine interest on your part in considering the State's views on this complex subject.

I have learned in over thirty-three years of private practice that, notwithstanding the merits of my clients' claims, there was invariably another side to the story and things were rarely as "absurd" as I might have believed. I am sure your remarks will receive widespread distribution here in Alaska and serve as a catalyst for tribal advocates – and perhaps that was your intention.

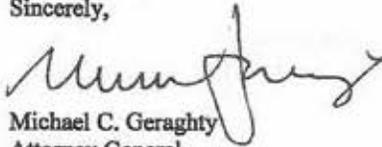
You requested some information regarding recent court rulings in Alaska on the complex subject of tribal court jurisdiction. I've attached a set of materials for your consideration.

Chairman Troy A. Eid
Re: Indian Law & Order Commission

November 14, 2012
Page 2

Thank you for your attention.

Sincerely,



Michael C. Geraghty
Attorney General

Enclosures

cc: Prof. Carole Goldberg w/encls. to cgoldberg@conet.ucla.edu
Joseph Masters, Commissioner, Dept. of Public Safety, SOA, w/o encls.
Kip Knudson, Director, State/Federal Relations, Office of the Governor, SOA, w/o encls.

DONALD C. MITCHELL
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November 29, 2012

Carole Goldberg
UCLA School of Law
1242 Law Building
385 Charles E. Young Drive
Los Angeles, California 90095

Dear Carole Goldberg:

Thank you for your letter dated November 20, 2012.

If I understand the content thereof correctly, the statements you made on Alaska public radio regarding "Indian country" in Alaska were correct. First, because the 80th Congress did not intend the term "Indian titles" in 18 U.S.C. 1151(c) to mean "Indian titles", but instead intended the term to mean "the restricted or trust title distinctive to Indian allotments." And second, because the 80th Congress intended the approximately 3,800 house lots that the Secretary of the Interior has conveyed with a restricted title to Alaska Natives pursuant to the Alaska Native Townsite Act to be included within the purview of the term "Indian allotments" in 18 U.S.C. 1151(c).

In support of those inventive interpretations of the intent of the 80th Congress, you cite not a single snippet of legislative history that supports those interpretations. However, since there are no such snippets, that omission is not surprising.

Instead, you direct me to a paragraph in the 2012 edition of Cohen's Handbook of Federal Indian Law. However, in that paragraph the anonymous author thereof makes no mention of - much less does he or she purport to interpret the intent of the 80th Congress embodied in - the phrase "the Indian titles to which have not been extinguished" in 18 U.S.C. 1151(c). Instead, the author first implies that each house lot the Secretary of the Interior has conveyed pursuant to the Alaska Native Townsite Act is a "dependent Indian community" for the purposes of 18 U.S.C. 1151(b) because each lot purportedly is "under the direct superintendence of the Secretary of the Interior." But then in his or her next sentence the author abandons that theory and suggests that townsite lots are "Indian country" because they are "the functional equivalent of Native allotments."

Carole Goldberg
November 29, 2012
Page 2

In addition to the 2012 edition of the Handbook you also direct me to a sentence in the 2012 edition of Alaska Natives and American Laws that baldly asserts that the "plain meaning" of the term "Indian country" (presumably the 18 U.S.C. 1151 definition of that term) "incorporates Native allotments and Native townsites."

Insofar as the authoritative nature of the 2012 edition of the Handbook is concerned, I am incapable of refraining from noting that since you were an executive editor of the 2012 edition it takes considerable chutzpah to cite yourself as your own authority. But more importantly, you also were an editor of the 1982 edition of the Handbook, which at page 766 suggested that the land around each Native village that the Secretary of the Interior has conveyed to village and regional corporations in fee pursuant to the Alaska Native Claims Settlement Act was a "dependent Indian community" and hence 18 U.S.C. 1151(b) "Indian country".

We are aware of how that interpretation of the intent of the 80th Congress embodied in the term "dependent Indian community" turned out.

Finally, a word about the 2012 edition of Alaska Natives and American Laws. Unlike the paragraph in the 2012 edition of the Handbook on which you rely, we know who the author is of the sentence in Alaska Natives and American Laws that you believe is authoritative: my old and good friend David Case, who prior to expatriating to Kona to hoe weeds on the coffee plantation of a mutual friend of ours was for thirty years a leading political ideologue in the Alaska Native sovereignty bar.

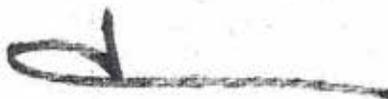
In that regard, it merits mention that, while you rely on the 2012 edition of Alaska Natives and American Laws, at pages 457-458 of the 1984 edition (which David wrote when he was just beginning his career as a founder of the then nascent Alaska Native sovereignty movement) David, like you and the other authors of the 1982 edition of the Handbook, suggested that the land around each Native village that the Secretary of the Interior has conveyed to village and regional corporations in fee pursuant to the Alaska Native Claims Settlement Act was a "dependent Indian community" and hence 18 U.S.C. 1151(b) "Indian country".

Carole Goldberg
November 29, 2012
Page 3

In 1998 when the U.S. Supreme Court issued its decision in Alaska v. Native Village of Venetie Tribal Government - an appeal in which you and all of the other editors of the 1982 edition of the Handbook appeared as amici to assert an interpretation of the intent of the 80th Congress embodied in the term "dependent Indian community" that the Court rejected by a vote of 9 to 0 - I had hoped that the Court's instruction regarding the difference between what the law is and what you and others might want the law to be would have been sufficiently professionally embarrassing to motivate legal intellectuals such as you and David to end your efforts to cloak your commitment to the advancement of the ideology of tribal sovereignty with the veneer of ersatz scholarly analysis.

Regrettably, your comments on Alaska public radio and your letter dated November 20, 2012 are evidence that my optimism in 1998 was misplaced.

Regards,

A handwritten signature in black ink, appearing to read "Don Mitchell". The signature is stylized with a large, sweeping initial "D" that extends across the line.

Don Mitchell

cc: Michael Geraghty - Alaska Attorney General
Troy Eid - Indian Law and Order Commission



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNELL

Department of Law

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February 1, 2013

By Email to eidt@gtlaw.com & 1st Class Mail

Troy Eid
Chairman, Indian Law and Order Commission
Greenberg Traurig, LLP
Tabor Center
1200 17th Street, Suite 2400
Denver, CO 80202



Re: Additional information for the Indian Law and Order Commission
("Commission")

Dear Chairman Eid:

The State of Alaska provides the following comments on some of the complex jurisdictional and policy issues facing the Commission that pertain to Alaska. We trust that this information will prove helpful to the Commission in developing recommendations for the White House and Capitol Hill.

As the Commission develops its findings, conclusions, and recommendations to "help with the greatest challenges to securing equal justice for Native Americans living and working on Indian lands,"¹ we respectfully request that the Commission consider Alaska's uniqueness. Alaska has 229 tribes and only one reservation; Alaska's tribes, with one exception, lack territorial jurisdiction.² Recommendations to address criminal justice issues "on Indian lands," which are intended to address problems endemic to the traditional reservation structure in most states, may conflict with Alaska's history and case law.

¹ Indian Law and Order Commission website,
<http://www.indianlawandordercommission.com> (last visited February 1, 2013).

² The one reservation in Alaska is the Annette Islands Reserve occupied by the Metlakatla Indian Community.

Limited existence of Indian Country in Alaska

18 U.S.C. § 1151 defines “Indian country” as (a) all land within the limits of any Indian reservation, (b) all dependent Indian communities within the borders of the United States, and (c) all Indian allotments, the Indian titles to which have not been extinguished. The term “Indian title” as used in 18 U.S.C. § 1151(c) means aboriginal title.³ Aboriginal title is a permissive right of occupancy granted by the federal government to the aboriginal possessors of the land.⁴ The right to extinguish original Indian title rests exclusively with Congress irrespective of who holds the underlying fee title in the land.⁵ Courts require a showing of clear and specific congressional intent to extinguish Indian title.⁶

Congress made such a clear statement of intent to extinguish Indian title in passing the Alaska Native Claims Settlement Act (ANCSA).⁷ ANCSA authorized the transfer of \$962.5 million and 44 million acres of land in exchange for the extinguishment of aboriginal title and any claims based on aboriginal title.⁸ Claims that Alaska Native allotments or Alaska Native townsites are Indian country are claims based on aboriginal title. Because ANCSA extinguished aboriginal title in Alaska, any claim that Alaska Native allotments or Alaska Native townsites are Indian country is meritless.

During the process of enacting ANCSA, Alaska Natives, represented by the Alaska Federation of Natives, made clear that they “very vehemently” opposed any settlement based on the reservation concept.⁹ This was not surprising, since “there was never an attempt in Alaska to isolate Indians on reservations. Very few were ever created, and the purpose of these, in contrast to many in other states, was not to confine the Indians for the protection of the white settlers but to safeguard the Indians against exploitation.”¹⁰ As a result, Alaska Native allotments and Alaska Native townsites were not created from former tribal reservation lands, are not within reservations, and lack any nexus between the land and tribal governance.

³ *Blatchford v. Gonzalez*, 670 P.2d 944, 947-48 (N.M. 1983), *cert. denied*, 464 U.S. 1022 (1984). Some treatises presume that the term “Indian country” merely means land the title to which has not been removed from trust or restricted title. *See, e.g.*, Nell Jessup Newton et al., *Cohen’s Handbook of Federal Indian Law* (2012 ed.). However, no controlling case law has adopted this view.

⁴ *Johnson and Graham’s Lessee v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823); *accord United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941); *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976).

⁵ *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-69 (1974).

⁶ *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339; *Tee-Hit Ton Indians v. United States*, 348 U.S. 272, 277 (1955).

⁷ 43 U.S.C. §§ 1603(c), 1605, 1611.

⁸ *Id.*

⁹ *Alaska Native Land Claims: Hearings on S. 2906 Before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 89 (1968).

¹⁰ *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 51 (1962).

Alaska Native allotments were granted under the Alaska Native Allotment Act,¹¹ after Congress determined that the original General Allotment Act¹² did not apply to Alaska.¹³ The Alaska Native Allotment Act authorized the Secretary of the Interior to allot parcels as homesteads to individual Alaska Natives, with the land held in restricted fee status by the allottee rather than in trust by the United States.¹⁴ Because the definition of “Indian country” in 18 U.S.C. § 1151 specifically refers to Indian allotments, but omits any mention of Alaska Native allotments, and federal regulations found in 43 C.F.R. §§ 2530-2533 do not apply to Alaska Native Allotments, it is unlikely that Congress meant for Alaska Native Allotments to be considered “Indian country.”¹⁵

Similarly, the 1926 Alaska Native Townsite Act¹⁶ authorized the conveyance of townsite lots to individual Alaska Natives by way of restricted deeds, with the United States retaining neither legal nor equitable title. However, as the United States District Court for Alaska has indicated, the restricted status of Alaska Native townsite deeds does not automatically compel the conclusion that the townsites are “Indian country” under 18 U.S.C § 1151.¹⁷

Indian allotments in the Lower 48 states were carved from reservations, and the purpose of laws extending criminal jurisdiction on allotments to tribes or to the United States for the benefit of tribes was to prevent “checkerboard” pockets of state jurisdiction over former tribal lands.¹⁸ In stark contrast, a Congressional decision to extend tribal criminal jurisdiction over Alaska Native allotments would “create a checkerboard of small enclaves” of dual tribal and state jurisdiction where otherwise comprehensive state criminal jurisdiction would apply. In fact, the checkerboard analogy does not even fully capture the scattered geography of Alaska Native Allotments in Alaska, which by and large are individual hunting or fishing locations. Alaska tribes, with the exception of Metlakatla, do not have criminal jurisdiction over the lands near the Native Allotments such that an extension of tribal criminal jurisdiction to the Native Allotments would fill in the blanks. Accordingly, the concept of creating tribal criminal jurisdiction on these remote parcels does not make sense in the same way that it does on Indian allotments that are located within a reservation.¹⁹

¹¹ Act of May 17, 1906, 34 Stat. 197.

¹² Act of Feb. 8, 1887, 24 Stat. 288.

¹³ See *Pence v. Kleppe*, 529 F.2d 135, 140 (9th Cir. 1976).

¹⁴ *Jones v. State*, 936 P.2d 1263, 1265 (Alaska App. 1997).

¹⁵ *Id.*

¹⁶ Act of May 25, 1926, 44 Stat. 629.

¹⁷ *People of South Naknek v. Bristol Bay Borough*, 466 F. Supp. 870, 876-78 (D. Alaska 1979) (noting that “[b]oth the courts and Congress have long been troubled in applying the term “Indian country” to Alaska.”).

¹⁸ See generally, Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 508-13 (1976).

¹⁹ See *Jones*, 936 P.2d at 1267.

The State therefore strongly objects to any recommendation by the Commission that Alaska Native allotments and town sites be considered Indian country for the purposes of expanding tribal jurisdiction. Such a recommendation would undermine the comprehensive settlement achieved by the passage of ANCSA.

State recognition of tribal jurisdiction

Under federal case law, which largely controls tribal jurisdiction issues,²⁰ tribal jurisdiction depends on the location of events (on or off-reservation), the parties affected (members or nonmembers), and the specific topic (domestic relations, membership, criminal law, etc.). Given this backdrop and Alaska's unique circumstances, the scope of tribal court jurisdiction in Alaska is a complex issue that does not easily lend itself to generalizations.

Despite the uncertainties inherent in this area, the State recognizes the jurisdiction of Alaska tribes in numerous contexts. For example, the State recognizes the authority of the tribes to determine tribal membership.²¹ The State recognizes a tribe's inherent authority over its members in cases of child custody disputes and child protection cases where both parents and the child are all tribal members or eligible for membership.²² In general, under these circumstances the dispute falls within the tribe's inherent power "to regulate domestic relations among members, and determine tribal membership."²³ The State has also recognized tribes' authority to initiate adoption cases where the child is a tribal member or eligible for membership.²⁴

However, while the State recognizes tribal jurisdiction in many contexts involving internal domestic relations in Alaska, at least one major legal issue remains unanswered—the scope of tribal jurisdiction over nonmembers.²⁵ The State's position²⁶ that tribes lack subject

²⁰ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008); *Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997) ("Indian law is uniquely federal in nature"); see also *John v. Baker*, 982 P.2d 738, 760 (Alaska 1999) ("we base our decision in this case on the decisions of Congress and the Supreme Court").

²¹ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (holding tribes have the power to make their own substantive law in internal matters such as tribal membership and to enforce that law in their own forums); see also *Roff v. Burney*, 168 U.S. 218, 223 (1897).

²² See *Native Village of Tanana*, 249 P.3d 734, 751 (Alaska 2011) (holding that tribes have "concurrent jurisdiction to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country," but reserving issue about tribal jurisdiction over nonmember parents).

²³ *Montana v. United States*, 450 U.S. 544, 564-65 (1981).

²⁴ See *Kaltag Tribal Council v. Jackson*, Order, 3:06-cv-00211-TMB, Order (D. Alaska Feb. 22, 2001), *aff'd*, 344 Fed.Appx. 324 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 66 (2010).

²⁵ *Native Village of Tanana*, 249 P.3d at 751-52. In *Tanana*, the Alaska Supreme Court highlighted that it was not making any decision about "the extent of tribal jurisdiction over non-member parents of Indian children." *Id.* at 752.

matter jurisdiction²⁷ over nonmembers in this context is firmly supported by Indian law jurisprudence.²⁸

The general absence of reservation land in Alaska is also a key factor as to the scope of tribal civil jurisdiction in Alaska. “[W]ith only ‘one minor exception, [the United States Supreme Court] ha[s] never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.’”²⁹ In 2001, the United States Supreme Court explained that *Montana* was a rejection of “tribal authority to regulate nonmembers’ activities on land over which the tribe could not assert a landowner’s right to occupy and exclude,”³⁰ and, “the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction.”³¹

In sum, Alaska offers a jurisdictional landscape quite unlike that found in the Lower 48, largely because of the lack of Indian country and the Alaska-specific jurisprudence that has evolved since the passage of ANCSA. Therefore, before the Commission recommends that Alaska Natives be offered the same programs designed for Native Americans on reservations in the Lower 48, where land-based jurisdiction is undisputed, the Commission should consider carefully the sweeping consequences of offering these programs outside of Indian country.

²⁶ The State is currently litigating the issue of the extent of tribal jurisdiction over nonmembers in a pending Alaska Supreme Court case, *Simmonds v. Parks*, Supreme Court No. S-14103.

²⁷ Tribal jurisdiction over nonmembers is a question of subject matter jurisdiction, not personal jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 368 n.8 (2001).

²⁸ “[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are ‘presumptively invalid.’” *Plains Commerce*, 554 U.S. at 330 (quoting *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001)). “Tribes, as domestic dependent nations, have no authority over nonmembers unless one of the two *Montana* exceptions (narrowly construed) applies.” William C. Canby, *American Indian Law in a Nutshell* 91 (5th ed. 2009); see also L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809, 814-15 (1996) (“Tribal powers over nonmembers are held to be destroyed whenever Congress has broadly opened land to non-Indians, regardless of its purpose.”). The first *Montana* exception allows tribal jurisdiction over a nonmember who enters into “consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements.” Under the second exception, a tribe may have jurisdiction where nonmember conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 565-66.

²⁹ *Plains Commerce Bank*, 554 U.S. at 333 (quoting *Hicks*, 533 U.S. at 360).

³⁰ *Hicks*, 533 U.S. at 359 (internal citations omitted).

³¹ *Id.* at 360; see also *Atkinson Trading*, 532 U.S. at 653 (“An Indian tribe’s sovereign power to tax . . . reaches no further than tribal land.”).

Alaska tribes lack off-reservation criminal jurisdiction

While, as discussed, the State does recognize tribal civil authority off-reservation in certain scenarios, the State's position is that tribes do not possess any off-reservation criminal jurisdiction—either over members *or* nonmembers, as discussed below. Despite the lack of tribal criminal jurisdiction in Alaska, the State fully supports the Commission's goal of addressing violent crime and other chronic criminal issues affecting Native populations. On the other hand, the State strongly objects to any attempts to expand tribal criminal jurisdiction off reservation. Any such expansion will create more problems than it will solve.

First, recommending that tribal criminal jurisdiction be expanded outside of Indian country would mark a fundamental shift in Indian law jurisprudence that should not be taken lightly. "The jurisdiction of a tribe is generally confined to crimes committed within the geographical limits of its reservation and, presumably, any of its dependent Indian communities."³² The geographical location where the crime occurred is one of the key factors that determines which sovereign has jurisdiction over the crime.³³ For example, in general, an arrest must be made within the arresting authority's territorial jurisdiction in order to be valid.³⁴ Land status is particularly important because Tribal authority "*centers on the land held by the tribe and on tribal members within the reservation.*"³⁵

Under Public Law 280 ("P.L. 280"), the State's criminal authority extends to all Alaska territory, including Indian country, and federal criminal jurisdiction is mostly or entirely missing.³⁶ Alaska, a mandatory P.L. 280 state, has exclusive jurisdiction over offenses covered

³² William C. Canby, *American Indian Law in a Nutshell* 192 (5th ed. 2009); *see also*, *State v. Eriksen*, 259 P.3d 1079, 1084 (Wash. 2011) (holding that tribe's inherent sovereign powers do not include authority to stop and detain parties outside tribe's territorial jurisdiction for traffic infraction).

³³ *See Application of De Marrias*, 91 N.W.2d 480, 481 (S.D. 1958) (describing how "jurisdiction in a particular case is dependent upon the following variable factors: (1) locus of the crime, (2) status of the Indian, and (3) nature or degree of the crime.")

³⁴ Nell Jessup Newton et al., *Cohen's Handbook of Federal Indian Law* 73 (2012 ed.).

³⁵ *Plains Commerce*, 554 U.S. at 327 (emphasis added); *Atkinson Trading*, 532 U.S. at 653 ("An Indian tribe's sovereign power to tax – whatever its derivation – reaches no further than tribal land."); *id.* at 655 ("territorial restriction upon tribal power"); *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("right of *reservation* Indians to make their own laws and be ruled by them") (emphasis added).

³⁶ Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C. § 1162). PL 280 specifically clarified that the Metlakatla Indian Community still enjoyed concurrent jurisdiction on its reservation, stating that it "may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended." 18 U.S.C. § 1162.

by the Indian Country Crimes Act³⁷ and the Indian Major Crimes Act³⁸ (once under the jurisdiction of the federal government).³⁹

Federal law also limits tribal criminal jurisdiction in several significant ways: for example, a tribe's criminal jurisdiction does not extend to non-Indians, even if the non-Indian commits a crime in Indian country.⁴⁰ Moreover, the Indian Civil Rights Act ("ICRA") provides limits on the maximum penalties that tribal courts can impose.⁴¹ In the Tribal Law and Order Act of 2010, Congress raised these limits to three years' imprisonment or a fine of \$15,000 for any one offense (if certain other conditions are met), and it prohibited tribal courts from imposing a total criminal punishment greater than imprisonment for nine years.⁴²

The Commission should decline to issue recommendations that would encourage lawmakers to completely disregard this existing legal framework by creating administrative spheres of jurisdiction that approximate Indian country in Alaska. Given ANCSA's extinguishment of Indian title, a backdoor attempt like this to redefine "Indian country" to include Alaska should be avoided.

In addition, empowering over two hundred separate sovereign entities with criminal jurisdiction would have serious consequences both for the State and its citizens. Such a change

³⁷ 18 U.S.C. § 1151.

³⁸ Act of Mar. 3, 1885, §9. 23 Stat.362 (codified as amended at 18 U.S.C. §§ 1153, 3242). The Major Crimes Act provides for federal jurisdiction over a list of major crimes committed by Indians in Indian country (e.g. felony sexual abuse, incest, rape, murder, manslaughter, kidnapping, maiming, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, felony child abuse or neglect, assault against an individual who has not attained the age of 16 years, arson, burglary, and robbery). 18 U.S.C. § 1153(a).

³⁹ Pub. L. No. 91-523, 84 Stat. 1358 (1970) (codified at 18 U.S.C. § 1162(c)).

⁴⁰ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203, n.14 (1978) (holding tribe lacked criminal jurisdiction over offenses committed by non-Indians within reservation's borders). However, note that the Supreme Court has clarified that tribes can prosecute non-member *Indians* for crimes committed on a reservation. See *United States v. Lara*, 541 U.S. 193, 198-99 (2004) (holding Congress had power to enlarge tribes' powers of self-government by statute to include inherent power of Indian tribes to exercise criminal jurisdiction over all Indians, including nonmembers.).

⁴¹ 25 U.S.C. § 1302(7); see *Oliphant*, 435 U.S. at 203 n.14 (question whether federal government has exclusive jurisdiction over major crimes "was mooted for all practical purposes by the passage of [ICRA] which limits the punishment that can be imposed by Indian tribal courts").

⁴² 25 U.S.C.A. § 1302(a). Metlakatla Indian Community's criminal code does not exercise the maximum allowable authority and instead cedes jurisdiction to the State over most major crimes, and none of the tribal criminal offenses are punishable by more than 1 year of imprisonment. See Law & Order Code of the Metlakatla Indian Community, Title One (2011).

would create a confusing patchwork quilt of jurisdiction,⁴³ undermine the clarity of the current system, and complicate the State's ability to police its own territory. Conflicts will arise when a tribe seeks state recognition or enforcement of a criminal order that conflicts with Alaska law, such as a tribal court banishment order issued pursuant to tribal law. There is also currently no double jeopardy prohibition in Alaska law which would prevent the State from re-trying an offender whose crime has been adjudicated in tribal court. Without years of advance planning and coordination with the State, significant issues are also likely to arise given that many of Alaska's 228 off-reservation tribes currently lack criminal justice infrastructure such as written codes, courtrooms or jails.

Many of the costs of suddenly empowering over two hundred separate criminal jurisdictions will ultimately be borne by the individuals subjected to tribal jurisdiction. In the event that individuals experience violations of their state and federal constitutional rights in tribal court, they would likely lack a remedy outside the tribal context.⁴⁴ Furthermore, unlike on reservation land in the lower 48, where signs and borders make it clear that one has entered tribal territory, individuals would have no clear signal that their actions on a particular piece of land or in a particular Alaska town will be subject to tribal jurisdiction. Accordingly, individuals would be subjected to tribal criminal prosecution and significantly different due process standards without any notice or consent.⁴⁵ In addition, while some villages are mostly comprised of Alaska Natives, many villages have large non-Native populations as well. The result would be to create a community where offenders receive different treatment of their criminal offenses⁴⁶ depending on tribal membership status, which correlates to the individual's race.

In sum, "[e]fforts at . . . tribal self-government are encouraged, but not at the expense of the states in which they reside and in disregard of those laws that protect both Indian and non-Indian citizens."⁴⁷ The State requests that the Commission refrain from recommending that

⁴³ See *Jones v. State*, 936 P.2d at 1267.

⁴⁴ ICRA violations by a tribal court cannot be adjudicated in the federal courts: plaintiffs must seek to vindicate ICRA rights in tribal court. The one exception is for habeas corpus claims. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

⁴⁵ Tribes are not bound by the same due process standards as the state; in particular, criminal defendants have no *Miranda* rights and no right to appointed counsel for crimes with a total term of imprisonment of less than one year. See 25 U.S.C. §§ 1301-1303.

⁴⁶ One frequently repeated concern in Alaska's villages is that alcohol-related and domestic violence-related convictions result in state criminal records that can hinder employment prospects. It would not be unreasonable to expect that a tribal criminal system would avoid criminal convictions and result in tribal offenders receiving much less serious sanctions than they would receive under Alaska law, creating a two-tiered justice system in the state.

⁴⁷ *State of Oklahoma ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 91 (OK 1986).

policies drafted at the national level to address criminal justice issues “on Indian lands,” which are targeted at the traditional reservation structure in most states, be applied to Alaska.

Cooperation between the State and tribal governments

We would also like to take this opportunity to describe some of the most significant examples of cooperation between the State and tribal governments in Alaska. As partners, the State and its tribes may not always agree on every point, particularly regarding sovereignty issues: however, we have jointly made significant strides at achieving our shared goal of creating a better future for Alaskans.

To point out just some of the initiatives the State has recently undertaken in cooperation with tribes:

- **Public Safety and the Department of Corrections**
 - The Department of Corrections has made concerted efforts over the years to develop a strong and positive relationship with the Native community in Alaska. The State has contributed significant funding for training, housing, and pay raises for Village Public Safety Officers (“VPSOs”) that serve the rural communities where many tribes are located. In Alaska, under AS 18.65.670 and its accompanying regulations, VPSOs are hired by regional native corporations but trained by the State and supervised by the Alaska State Troopers. They assist local villages in the protection of life and property. These officers attend public safety training at the state police academy in Sitka, and they enforce state law.
 - The State created new trooper posts in Emmonak and Selawik, and increased VPSO oversight by adding three support troopers for Bethel, Fairbanks, and Kotzebue. The cost of establishing and operating those additional posts since 2009 is approximately \$2.1 million. The number of filled VPSO positions doubled from 47 in 2008 to 96 in January of 2012. Five rural communities also received low interest loans for VPSO housing.
 - Governor Parnell has put forward the “Choose Respect” initiative to fight the high levels of domestic violence and substance abuse in Alaska, including the predominantly Native communities. The Choose Respect initiative includes programs specifically designed to reach Alaska Native communities and people in culturally relevant ways.
 - The Drug Abuse Resistance Education (D.A.R.E.) program trains police officers and VPSOs across Alaska to teach a 10-week drug abuse resistance program to elementary, middle school, and high school students in their communities. D.A.R.E. Officers teach children to make healthy decisions, and are viewed as role models in their communities. As part of the D.A.R.E. program, the Department of Public Safety and the Northwest Arctic Borough School District teamed up to provide Safety and Security assessment to all 10 village schools surrounding Kotzebue.

- In 2010, the Iḷisagvik Tribal College in Barrow, Alaska contacted the Alaska State Troopers requesting the possible establishment of a Public Safety summer camp for their regional youth. In 2011, the Alaska State Troopers, U.S. Marshal's Service, State Crime Lab, and State Fire Service developed the first Alaska Youth Academy. They initiated a trial program focusing on at-risk Native Alaskan young adults in an effort to steer them away from alcoholism, drug abuse and domestic violence plaguing their communities and towards a crime-free life of public service. The Barrow camp was very successful and the College invited the group of instructors back the following year. The agencies felt the academy concept was a valuable tool to approach the problem of finding qualified applicants for the many law enforcement and public safety jobs available in Alaska. In 2012, two camps were established, one in Bethel and one in Barrow. The camps were well attended, and the State hopes to expand the program.
- The State is working on several initiatives to improve the justice system in rural Alaska. For example, due to overcrowding and court-enforced population capacities, the Department of Corrections had to contract with private prisons in the Lower 48 to house overflow prisoners starting in the mid-1990s. The Department of Corrections currently has about 1100 prisoners at a prison facility in Hudson, Colorado. A new 1500-bed prison, Goose Creek Correctional Center, was recently completed near Pt. MacKenzie, and the Department of Corrections is in the process of making it operational. All prisoners at the Colorado facility are expected to be back at Alaska facilities by the fall of 2013. Keeping the prison population local will help facilitate Alaska Native prisoner access to their families and Native elders, and their reintroduction into their communities.
- One of the largest events coordinated by the Department of Corrections is the potlatch at the Hudson Correctional Center in Colorado. This event allows inmates to receive mentoring from Alaska Native community leaders, participate in cultural activities (such as traditional dancing and preparation of the meal), and eat traditional foods. This event has become extremely important to those who participate and offers the inmates an opportunity to reconnect with their culture.
- The Department of Corrections has worked with Tanana Chiefs Conference in Fairbanks to establish video visitation which gives inmates the opportunity to connect with family members and elders in their communities.
- The Department of Corrections has participated in roundtable-type discussions with Native leaders in the Northern regions of the state for several years and is working to set up similar meetings with various other Alaska Native groups. These productive and positive meetings have focused efforts on ensuring more effective reentry into their traditional communities for our Alaska Native inmates. In addition to these roundtable meetings, the Department of Corrections has issued letters to various Alaska Native groups throughout the state to request guidance and assistance in better preparing our Alaska Native inmates to reenter our communities.

- The Department of Corrections has also hired three additional probation officers, stationed in Anchorage, Fairbanks, and Bethel, whose focus is the supervision of rural/remote probationers and parolees and assisting them with reintegration into their communities.
- Additionally, the Department of Corrections offers many reentry and rehabilitation programs (both inside and outside of our facilities), which help prepare inmates to become productive community members. Each of these programs is administered with an eye towards cultural sensitivity and tailored to meet the unique needs of each one of our inmates.

- **Department of Health and Social Services**

- The Department of Health & Social Services meets with the Alaska Native Health Board twice a year in a forum called the MEGA meeting. The purpose of the meeting is for the Department of Health & Social Services Division Directors and Tribal leaders to get together to discuss federal and state legislative priorities and initiatives. The MEGA meeting designated a subgroup, the State/Tribal Medicaid Task Force, to focus specifically on programmatic and financial issues. The Medicaid Task Force is an effective alliance in which the State and tribes collaborate to resolve issues and discuss initiatives. The success of these quarterly meetings is due to good working relationships built on trust and mutual interest. Attendees commonly include tribal chief financial officers, finance and operations staff, and State Medicaid operations and policy staff. These meetings focus on the Medicaid funding that is essential to the health care of Alaska Natives and the tribal health care system. The State Medicaid staff also use these meetings to supplement the formal written tribal consultation process for Medicaid State Plan Amendments through informal briefings and discussions on upcoming amendments.
- The Indian Child Welfare Act liaison help desk at the Office of Children's Services is staffed with employees of tribes or native organizations who serve as invaluable resources for state social workers conducting relative searches.⁴⁸
- The Office of Children's Services participates in joint State/tribal training to educate staff on the history of Alaska Natives and tribal cultural practices.
- The Office of Children's Services has undertaken a pilot program with Tanana Chiefs Conference to develop Alaska's first pass-through agreement for federal IV-E maintenance funds to pay for foster care in tribally licensed foster homes.

⁴⁸ <http://hss.state.ak.us/ocs/ICWA/helpdesk.htm> (last visited February 1, 2013). Scholars studying this issue nationwide have recognized the Office of Children's Services for its innovative approach to improving the search for ICWA preferred placements. See Aaron F. Arnold, Sarah Cumbie Reckess, Robert V. Wolf, *State and Tribal Courts: Strategies for Bridging the Divide*, 1, 19 (2011), available at <http://www.courtinnovation.org/sites/default/files/documents/StateAndTribalCourts.pdf>.

- The State requests the participation of tribal representatives in the recruitment and hiring process for key Office of Children's Services leadership positions.

- **Division of Juvenile Justice**

- The State works with tribes on programs funded through federal grants related to delinquency prevention, mentoring, life skills and family involvement, youth courts and community panels, and enforcing underage drinking laws.
- The State conducts regional "mini-conferences" in collaboration with Alaska Native partners to discuss juvenile justice and community issues
- The Department of Health and Social Services has established a "Bring the Kids Home" Project. This Project was created to return children being served in out-of-state facilities, including children from tribal communities, back to in-state residential or community-based care. The Project intends to reinvest funding now going to out-of-state care to in-state services and develop the capacity to serve children closer to home.
- Three times a year, the Tribal/State Collaboration Group meets to evaluate the Alaska child welfare delivery system; to enhance or change services to better fit the needs of families in Alaskan communities; to advocate for a continuum of services that are culturally relevant, coordinated, integrated and family focused; to maximize the programs and services for children supported by federal dollars in Alaska; to increase positive communication; and to generally develop effective collaboration between Tribes and Office of Children's Services' staff.

- **Division of Public Assistance**

- Twelve Tribal Organizations receive federal block grants to provide home heating assistance to low-income households. In State fiscal year 2012, over \$19 million in State general funds augmented the federal block grants and allowed 9 of these organizations to additionally provide Alaska Affordable Heating Assistance Program benefits to eligible households. These tribal organizations helped keep over 7,000 households in 75 largely rural communities warm last winter. These tribally-administered benefits go to all community members.
- The State provides grants to 9 tribal health and regional non-profit organizations through the Alaska's Women Infants & Children program. These grants allow the tribal organizations to operate WIC clinics that help ensure women, infants and children in their communities receive supplemental nutrition services and benefits.
- Temporary Assistance to Needy Families (TANF) - In State fiscal year 2012, the State provided \$13M to 7 Alaska Native Regional non-profit organizations to supplement their TANF block grant. The money helps pay cash assistance benefits and supportive services for families participating in work activities.

- The State has provided \$336M over three years to tribal medical facilities including Maniilaq Elder Care, the Wrangell Nursing Home, Norton Sound Long-term Care Facility, Copper River Health Center, Dena'ina Health Center, and many others.
- The State has contributed over \$1.6M since 2011 to RurAL CAP, a private, statewide, nonprofit organization with tribal partners that works to improve the quality of life for low-income and rural Alaskans.

- **Department of Labor and Wage Determinations**

- The Department of Labor & Workforce Development collaborates with the Cook Inlet Tribal Council to house a state “affiliated” job center (“Alaska’s People Career Development Center”) at the Tribal Council.
- Alaska’s Institute of Technology has partnered with the Chenega Corporation to provide student career experiences and post-secondary vocational technical training at both the Institute and at Chenega schools and villages. The program was supported by tax credits to Alaska’s Institute of Technology – \$100,000 each year in 2010, 2011 and 2012. Alaska’s Institute of Technology partners with CITC Healthcare and Nursing to offer a Healthcare Training program which provides training and education opportunities to become a Certified Nursing Assistant, Licensed Practical Nurse or Registered Nurse. The program also provides training opportunities in medical billing and coding.
- The Department of Labor & Workforce Development shares and coordinates resources with the Aleutian Pribilof Islands Association, the federally recognized tribal organization of the Aleut people in Alaska. The Association provides a broad spectrum of services to tribal communities throughout the region including health, education, social, psychological, employment, vocational training, and public safety services.
- The Alaska Workforce Investment Board entered into a Memorandum of Understanding with Alaska Native Sec. 166 grantees to support training and employment activities.
- The State entered into a Memorandum of Understanding with the Ketchikan Indian Community to further the Alaska Career Ready Program.

- **Education**

- The State has sponsored the funding for new schools, school renovations, major school maintenance projects, and school energy costs in tribal communities. Since taking office, Governor Parnell has created the Rural School Construction Fund and funded construction of rural schools. For example, \$33 million in the Governor’s FY14 budget is slated for funding construction of the Nightmute School and \$13 million for construction of the Quinhagak school. Over the four year period (FY11 – FY14) construction funding totals \$297,423,193 in new schools and renovations for rural, primarily Alaska Native, villages. This

represents an average of \$75 million a year to support rural, Alaska Native students. There is also \$25 million in the Governor's FY14 budget to help ALL school districts cover increased energy costs.

- The Alaska Native Language Preservation and Advisory Council was established in 2012 (through Senate Bill 130) to preserve, restore, and revitalize Alaska Native languages, and to advise both the Governor and the Legislature (through reports issued every other year) on programs, policies, and projects to accomplish these purposes. The Council includes five voting members who are professional language experts and who represent diverse regions of the state. The first report is due on or before July 1, 2014.

- **Alaska Energy Authority**

- **Renewable Energy Funding:** The Alaska Energy Authority estimates that by the end of 2013, 44 Renewable Energy Fund projects will be complete and saving more than ten million gallons of diesel fuel or equivalent annually. Throughout rural Alaska, the Alaska Energy Authority has completed 71 of 107 Bulk Fuel Upgrade projects and 51 of 110 Rural Power System Upgrade projects. Since 2000, in partnership with the Denali Commission (a federal-state organization of which Alaska Federation of Natives President Julie Kitka is a Commissioner), the Alaska Energy Authority has completed \$304 million in Rural Bulk Fuel and Rural Power System Upgrade projects.
- **Weatherization Funding:** Many Alaskan villages benefit from the Energy Efficiency and Conservation program, which focuses on achieving Alaska's goal of a 15 percent increase in energy efficiency through whole-building energy audits; energy efficiency measures in public buildings and facilities, commercial buildings and small industrial buildings; and through public education. Current initiatives include Energy Efficiency and Conservation Block Grants, the Village Energy Efficiency Program, whole village retrofits, industrial energy audits, a statewide public education and outreach program, and assistance with regional energy efficiency planning and implementation.
- **Power Cost Equalization:** The goal is to provide economic assistance to customers in rural areas of Alaska where the kilowatt-hour charge for electricity can be three to five times higher than the charge in more urban areas of the state. Power Cost Equalization pays a portion of approximately 30% of all kilowatt-hours sold by the participating utilities. This program fundamentally improves Alaska's standard of living by helping small rural areas maintain the availability of communications and the operation of basic infrastructure and systems, including water and sewer, incinerators, heat and light. Power Cost Equalization is a core element underlying the financial viability of centralized power generation in rural communities where many tribes are located.

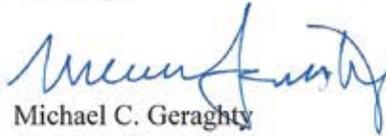
- The Governor is a strong supporter of major maintenance capital improvement projects in rural Alaska. The major maintenance grant funding over the last four years totaled \$90,883, 954. This funding provided for 48 projects across Alaska, many in rural, primarily Alaska Native, villages. The rural projects included roof repairs and replacement, water service and boiler replacement, school maintenance, electrical repairs, soil remediation, generator and fuel tank replacement, sprinkler systems upgrades, and mechanical repairs.

Conclusion

The State agrees that additional funding is necessary to improve tribal courts and justice in rural Alaska. The State fully supports initiatives that provide assistance and training to tribes, and also supports active tribal participation in grant programs and advisory committees. However, the State does not believe that expanding tribal jurisdiction is necessary in order to achieve the positive outcomes sought by the Commission. State, tribal, regional corporation, and nonprofit entities are all diligently working to improve the justice system and public safety in tribal communities. Proffering solutions that fundamentally change the nature of ANCSA and the law regarding tribal jurisdiction in Alaska will only create uncertainty and give rise to expensive litigation that will distract from the work that needs to be done. The existing tribal-State initiatives are well positioned to improve the lives of tribal member residents, and their capacity and reach will continue to expand if funding for these programs remains intact.

Thank you for taking the time to review the State's input on the complex matters under review by the Commission. If you have any questions, please do not hesitate to ask.

Sincerely,



Michael C. Geraghty
Attorney General

cc: Wilson Justin, Alaska Tribal Advisory Committee Member to the Commission
Georgianna Lincoln, Alaska Tribal Advisory Committee Member to the Commission
Senator Mark Begich
Senator Lisa Murkowski
Representative Don Young

DATA AND REPORTS REQUIRED BY THE TRIBAL LAW AND ORDER ACT OF 2010, P.L. 111-211

1. The Director of the Office of Justice Services, Bureau of Indian Affairs (BIA), U.S. Department of Interior, in coordination with the Attorney General must submit an annual report to Congress describing Indian country crime data collected and analyzed.

SEC. 211. (b)(2)(D) [(14) The Director of the BIA Office of Justice Services] “in coordination with the Attorney General pursuant to subsection (g) of section 302 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3732) collecting, analyzing, and reporting data regarding Indian country crimes on an annual basis;”

2. The BIA Office of Justice Services must annually share all crime data received from Tribal law enforcement agencies, including Uniform Crime Reports, with the Department of Justice.

SEC. 211. (b)(2)(D) [(15) BIA Office of Justice Services] “on an annual basis, sharing with the Department of Justice all relevant crime data, including Uniform Crime Reports, that the Office of Justice Services prepares and receives from tribal law enforcement agencies on a tribe-by-tribe basis to ensure that individual tribal governments providing data are eligible for programs offered by the Department of Justice;”

3. The BIA Office of Justice Services must submit an annual report on Tribal public safety and justice programs, including number of personnel and detailed spending, to the appropriate congressional committees.

SEC. 211. (b)(2)(D) [(16) BIA Office of Justice Services]“submitting to the appropriate committees of Congress, for each fiscal year, a detailed spending report regarding tribal public safety and justice programs that includes—

(A)(i) the number of full-time employees of the Bureau and tribal governments who serve as—

(I) criminal investigators;

(II) uniform police;

(III) police and emergency dispatchers;

(IV) detention officers;

(V) executive personnel, including special agents in charge, and directors and deputies of various offices in the Office of Justice Services; and

(VI) tribal court judges, prosecutors, public defenders, appointed defense counsel, or related staff; and

(ii) the amount of appropriations obligated for each category described in clause (i) for each fiscal year;

(B) a list of amounts dedicated to law enforcement and corrections, vehicles, related transportation costs, equipment, inmate transportation costs, inmate transfer costs, replacement, improvement, and repair of facilities, personnel transfers, detailees and costs related to their details, emergency events, public safety and justice communications and technology costs, and tribal court personnel, facilities, indigent defense, and related program costs;

(C) a list of the unmet staffing needs of law enforcement, corrections, and court personnel (including indigent defense and prosecution staff) at tribal and Bureau of Indian Affairs justice agencies, the replacement and repair needs of tribal and Bureau corrections facilities, needs for tribal police and court facilities, and public safety and emergency communications and technology needs; and

(D) the formula, priority list or other methodology used to determine the method of disbursement of funds for the public safety and justice programs administered by the Office of Justice Services;”

4. The BIA Office of Justice Services must submit an annual report to the appropriate congressional committees describing the technical assistance, training, and other support provided to Tribal law enforcement and corrections agencies with self-determination contracts or self-governance compacts with the Secretary of the Interior.

SEC. 211. (b)(2)(D) [(17) BIA Office of Justice Services] “submitting to the appropriate committees of Congress, for each fiscal year, a report summarizing the technical assistance, training, and other support provided to tribal law enforcement and corrections agencies that operate relevant programs pursuant to self-determination contracts or self-governance compacts with the Secretary [of the Interior];”

5. Within one year of the law’s enactment, in coordination with the Department of Justice, the Secretary of the Interior must submit to Congress a long-term plan for addressing incarceration in Indian country.

SEC. 211. (b)(5) [(f)]“LONG-TERM PLAN FOR TRIBAL DETENTION PROGRAMS.—Not later than 1 year after the date of enactment of this subsection, the Secretary [of the Interior], acting through the Bureau [of Indian Affairs], in coordination with the Department of Justice and in consultation with tribal leaders, tribal courts, tribal law enforcement officers, and tribal corrections officials, shall submit to Congress a long-term plan to address incarceration in Indian country, including—

- (1) a description of proposed activities for—
 - (A) the construction, operation, and maintenance of juvenile (in accordance with section 4220(a)(3) of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2453(a)(3)) and adult detention facilities (including regional facilities) in Indian country;
 - (B) contracting with State and local detention centers, upon approval of affected tribal governments; and
 - (C) alternatives to incarceration, developed in cooperation with tribal court systems;
- (2) an assessment and consideration of the construction of Federal detention facilities in Indian country; and
- (3) any other alternatives as the Secretary, in coordination with the Attorney General and in consultation with Indian tribes, determines to be necessary.”

6. The FBI must create an annual report by field division on decisions not to refer investigations in Indian country for prosecution.

SEC. 212. [(a)(2)] “INVESTIGATION DATA.—The Federal Bureau of Investigation shall compile, on an annual basis and by Field Division, information regarding decisions not to refer to an appropriate prosecuting authority cases in which investigations had been opened into an alleged crime in Indian country, including—

- (A) the types of crimes alleged;
- (B) the statuses of the accused as Indians or non-Indians;
- (C) the statuses of the victims as Indians or non-Indians; and
- (D) the reasons for deciding against referring the investigation for prosecution.”

7. United States Attorneys who decline to prosecute alleged Federal crimes in Indian country must submit an annual declination report by Federal judicial district to the Native American Issues Coordinator at the Executive Office of the United States Attorneys.

SEC. 212. [(a)(4)] “PROSECUTION DATA.—The United States Attorney shall submit to the Native American Issues Coordinator to compile, on an annual basis and by Federal judicial district, information regarding all declinations of alleged violations of Federal criminal law that occurred in Indian country that were referred for prosecution by law enforcement agencies, including—

- (A) the types of crimes alleged;
- (B) the statuses of the accused as Indians or non-Indians;
- (C) the statuses of the victims as Indians or non-Indians; and
- (D) the reasons for deciding to decline or terminate the prosecutions.”

8. The Attorney General must submit an annual report to Congress on decisions not to refer investigations for prosecution and decisions to decline to prosecute cases in Indian country. [See numbers 6 and 7 above.]

SEC. 212. [(b)] “ANNUAL REPORTS.—The Attorney General shall submit to Congress annual reports containing, with respect to the applicable calendar year, the information compiled under paragraphs (2) and (4) of subsection (a)

- (1) organized—
 - (A) in the aggregate; and
 - (B)(i) for the Federal Bureau of Investigation, by Field Division; and
 - (ii) for United States Attorneys, by Federal judicial district; and
- (2) including any relevant explanatory statements.”

9. In coordination with the Secretary of the Interior, the Attorney General must submit a report within 4 years of the law’s enactment to the appropriate congressional committees on the effectiveness of the Tribal court sentencing authority.

SEC. 234.(b) “REPORT.—Not later than 4 years after the date of enactment of this Act, the Attorney General, in coordination with the Secretary of the Interior, shall submit a report to the appropriate committees of Congress that includes—

- (1) a description of the effectiveness of enhanced tribal court sentencing authority in curtailing violence and improving the administration of justice on Indian lands; and
- (2) a recommendation of whether enhanced sentencing authority

should be discontinued, enhanced, or maintained at the level authorized under this title.”

10. The Attorney General must submit a report to Congress on the Bureau of Prisons Tribal Prisoner Pilot Program within 3 years of the program’s start.

SEC.234. (c) (5) “REPORT.—Not later than 3 years after the date of establishment of the [Bureau Of Prisons Tribal Prisoner Pilot Program], the Attorney General shall submit to Congress a report describing the status of the program, including recommendations regarding the future of the program, if any.”

11. The Indian Law and Order Commission must submit its findings, conclusions, and recommendations within 2 years of the law’s enactment.

SEC. 235. “(f) REPORT.—Not later than 2 years after the date of enactment of this Act, the [Indian Law and Order] Commission shall submit to the President and Congress a report that contains—

- (1) a detailed statement of the findings and conclusions of the Commission; and
- (2) the recommendations of the Commission for such legislative and administrative actions as the Commission considers to be appropriate.”

12. The Secretary of the Interior, Attorney General, and Secretary of Health and Human Services must create a Memorandum of Agreement and submit it to Congress within 1 year of the law’s enactment. The Secretary of the Interior must provide a copy to Tribes after it has been entered into the *Federal Register*.

The relevant section of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 [25 U.S.C. 2411] now reads:

- (a) “IN GENERAL.—*Not later than 1 year July 29, 2010*, the Secretary of the Interior, the *Attorney General*, and the Secretary of Health and Human Services shall develop and enter into a Memorandum of Agreement which shall, among other things—
 - (7) provide for an annual review of such agreements by the Secretary of the Interior, the *Attorney General*, and the Secretary of Health and Human Services.
- (d) Publication.—The Memorandum of Agreement under subsection (a) shall be submitted to Congress and published in the Federal Register not later than 130 days after July 29, 2010. At the same time as publication in the Federal Register, the Secretary of the Interior shall provide a copy of this subtitle and the Memorandum

of Agreement under subsection (a) to each Indian tribe [emphasis added].”

13. The Secretary of Interior, Attorney General, and the Secretary of Health and Human Services, in cooperation with the Secretary of Education, must review health services including mental health and substance abuse services for Indian families and children for the Memorandum of Understanding and must submit their review to each Tribe.

The relevant section of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 now reads:

2141a(a) “In general—In the development of the Memorandum of Agreement required by section 4502 (a) of this title, the Secretary of the Interior, the Attorney General, and the Secretary of Health and Human Services shall review and consider—

- (1) the various programs established by Federal law providing health services and benefits to Indian tribes, including those relating to mental health and alcohol and substance abuse prevention and treatment,
- (2) tribal, State and local, and private health resources and programs,
- (3) where facilities to provide such treatment are or should be located, and
- (4) the effectiveness of public and private alcohol and substance abuse treatment programs in operation on October 27, 1986,

to determine their applicability and relevance in carrying out the purposes of this chapter.

(b) Dissemination

The results of the review conducted under subsection (a) of this section shall be provided to every Indian tribe as soon as possible for their consideration and use in the development or modification of a Tribal Action Plan.”

14. The Secretary of Interior, Attorney General, and the Secretary of Health and Human Services, in cooperation with the Secretary of Education, must review education programs and social services for Indian families and children for the Memorandum of Understanding and must submit their review to each Tribe.

The relevant section of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 now reads:

2431 “In the development of the Memorandum of Agreement required by section 2411 of this title, the Secretary of the Interior, the Attorney General, and the Secretary of Health and Human Services, in cooperation with the Secretary of Education shall review and consider—

- (1) Federal programs providing education services or benefits to Indian children,
 - (2) tribal, State, local, and private educational resources and programs,
 - (3) Federal programs providing family and social services and benefits for Indian families and children,
 - (4) Federal programs relating to youth employment, recreation, cultural, and community activities, and
 - (5) tribal, State, local, and private resources for programs similar to those cited in paragraphs (3) and (4),
- to determine their applicability and relevance in carrying out the purposes of this subtitle.
- (b) Publication.—The results of the review conducted under subsection (a) of this title shall be provided to each Indian tribe as soon as possible for their consideration and use in the development or modification of a Tribal Action Plan under section 2412 of this title.”

15. The Secretary of Interior, Attorney General, and the Secretary of Health and Human Services, in cooperation with the Secretary of Education, must review Tribal law enforcement and justice programs for the Memorandum of Understanding and must submit their review to each Tribe.

The relevant section of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 now reads:

2441(a) “In the development of the Memorandum of Agreement required by section 2411 of this title, the Secretary of the Interior, the *Attorney General*, and the Secretary of Health and Human Services, in cooperation with the *Attorney General*, shall review and consider—

- (1) the various programs established by Federal law providing law enforcement or judicial services for Indian tribes, and
- (2) tribal and State and local law enforcement and judicial programs and systems

to determine their applicability and relevance in carrying out the purposes of this chapter.

(b) Dissemination of review—The results of the review conducted pursuant to subsection (a) of this section shall be made available to every Indian tribe as soon as possible for their consideration and use in the development and modification of a Tribal Action Plan [emphasis added].”

16. The Attorney General must submit a report to Congress on the extent and effectiveness of the COPS program in Indian country within 180 days of the law’s enactment.

SEC. 243. [(k)]“REPORT.—Not later than 180 days after the date of enactment of this subsection, the Attorney General shall submit to Congress a report describing the extent and effectiveness of the Community Oriented Policing (COPS) initiative as applied in Indian country, including particular references to—

- (1) the problem of intermittent funding;
- (2) the integration of COPS personnel with existing law enforcement authorities; and
- (3) an explanation of how the practice of community policing and the broken windows theory can most effectively be applied in remote tribal locations.”

17. The Director of the Bureau of Justice Statistics, U.S. Department of Justice, must submit a report to Congress on data collected and analyzed relating to crime, delinquency, victimization, etc. in Indian country within 1 year of enactment and annually thereafter.

SEC. 251. (b) (5) “[g] REPORTS.—Not later than 1 year after the date of enactment of this subsection, and annually thereafter, the Director [of the Bureau of Justice Statistics] shall submit to Congress a report describing the data collected and analyzed under this section relating to crimes in Indian country.”

18. Within 1 year of the law’s enactment, the Comptroller General must submit a report to the U.S. Senate Committee on Indian Affairs and the U.S. House of Representatives Committee on Natural Resources containing the results and recommendations from a study of the capabilities of the Indian Health Service to handle evidence of sexual assaults and domestic violence required for criminal prosecutions.

SEC. 266. “STUDY OF IHS SEXUAL ASSAULT AND DOMESTIC VIOLENCE RESPONSE CAPABILITIES.

(a) STUDY.—The Comptroller General of the United States shall—

- (1) conduct a study of the capability of Indian Health Service facilities in remote Indian reservations and Alaska Native villages, including facilities operated pursuant to contracts or compacts under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b et seq.), to collect, maintain, and secure evidence of sexual assaults and domestic violence incidents required for criminal prosecution; and

- (2) develop recommendations for improving those capabilities.

(b) REPORT.—Not later than 1 year after the date of enactment of this Act, the Comptroller General shall submit to the Committee on Indian Affairs of the Senate and the Committee on Natural Resources of the House of Representatives a report describing the results of the study under subsection (a), including the recommendations developed under that subsection, if any.”

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PHOTO CREDITS

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Photographed by Bob Rowland: Ogala Sioux Tribe

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Photographed by Jason Reed: Red Lake Band of Chippewa Tribal Justice Complex

Chapter 1

Associate Press Photo / Photographed by Ted S. Warren: Who is an Indian

Photographed by John Rae: Flandreau Police Department

Photographed by Ivan Bajic: Police Badge

Photographed by John Rae: Flandreau Police Department

Chapter 2

Photographed by Troy Eid: Anchorage Alaska

Photographed by Troy Eid: Alaska State Patrol Caravan Aircraft

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Chapter 3

Photographed by Jason Reed: Red Lake Justice Center

Photographed by Leech Lake Band of Ojibwe: Joint Tribal State Jurisdiction

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Chapter 4

Photographed by Leech Lake Band of Ojibwe: Joint Tribal State Jurisdiction

Photographed by Ken Blackbird: Navajo Tribal Attorney

Photographed by Ken Blackbird: Northern Cheyenne Tribal Judge

Photographed by Leech Lake Band of Ojibwe: Joint Tribal State Jurisdiction

Chapter 5

Photographed by Mark Ryan: Colorado Indian River Tribes Juvenile Detention Center

Photographed by Mark Ryan: Colorado Indian River Tribe Temporary Juvenile Holding Facility Project

Photograph by Navajo Nation: Navajo Nation Correction Project

Chapter 6

Photographed by John Rae: Flandreau Police Department

Photographed by John Rae: Flandreau Police Department

Photographed by John Rae: Flandreau Police Department

Acronyms

ADPS	Alaska Department of Public Safety	OJJDP	Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice
ANCSA	Alaska Native Claims Settlement Act	OJP	Office of Justice Programs, U.S. Department of Justice
BIA	Bureau of Indian Affairs, U.S. Department of the Interior	OJS	Office of Justice Services, Bureau of Indian Affairs, U.S. Department of the Interior
BJA	Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice	OTJ	Office of Tribal Justice, U.S. Department of Justice
BJS	Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice	LES	Law Enforcement Sensitive
BOP	Bureau of Prisons, U.S. Department of Justice	MOA	Memorandum of Agreement
CFR	Code of Federal Regulations	MOU	Memorandum of Understanding
COPS	Community Oriented Policing Services Office, U.S. Department of Justice	NCIS	National Crime Information System
CTAS	Coordinated Tribal Assistance Solicitation, an Office of Justice Programs, U.S. Department of Justice funding mechanism	POST	Peace Officer Standards and Training
DOI	U.S. Department of the Interior	PTSD	Post Traumatic Stress Disorder
DOJ	U.S. Department of Justice	SAMHSA	Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services
FBI	Federal Bureau of Investigation, U.S. Department of Justice	SAUSA	Special Assistant United States Attorney
FTCA	Federal Tort Claims Act	SLEC	Special Law Enforcement Commission
HPPG	High Priority Performance Goal Initiative, in the Office of Justice Services, Bureau of Indian Affairs, U.S. Department of the Interior	TLOA	Tribal Law and Order Act of 2010
ICWA	Indian Child Welfare Act of 1978	UCR	Uniform Crime Report
IRA	Indian Reorganization Act of 1934	VAWA	Violence Against Women Act, referring to the amendments to the original law contained in the Violence Against Women Act Reauthorization Act of 2013
ICRA	Indian Civil Rights Act	VPSO	Village Public Safety Officer
LSC	Legal Services Corporation		
NCAI	National Congress of American Indians		

